No. 14590

In the United States Court of Appeals

for the Ninth Circuit

MEARL C. TILLMAN and
EMILY P. TILLMAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

On Appeal from the United States District Court
for the District of Oregon

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BRIEF FOR THE UNITED STATES

Jurisdiction

District Court jurisdiction of these cases depends upon the Tort Claims Act, 28 U.S.C.A. 1346(b). Jurisdiction of this Court depends upon 28 U.S.C.A. 1291.

Statement of the Case

These cases arise out of the 1948 Columbia River flood. That flood, the second highest in the history of the river (R. 80), was a major catastrophe in the history of the Northwest. It inundated more than 400,000 acres of land (R. 80), it took the lives of forty-one persons (R. 80), and it did property damage estimated at $100,000,000 (R. 80). On the afternoon of May 30, 1948, the flood waters broke through the western embankment at Peninsula Drainage District No. 1 (R. 80), a drainage district situated along

the south bank of the river on the outskirts of Portland. Within an hour Vanport, a large housing project belonging to the United States and located within the district, was flooded and the property of the Vanport tenants destroyed (R. 81). Fourteen Vanport residents lost their lives but about 16,000 persons were safely evacuated.

As the flood water filled District No. 1 it exerted pressure on Denver Avenue, a highway fill which separates that district from Peninsula Drainage District No. 2. A flood fight was conducted along Denver Avenue but some thirty hours after the initial failure and between 9:00 and 10:00 P. M. on the night of May 31, 1948, a ring levee surrounding an underpass built through Denver Avenue failed (R. 81), permitting the water to enroach upon and eventually fill that portion of District No. 2 which lies between Denver Avenue and another highway fill known as Union Avenue (R. 81). Two or three hours later the Union Avenue fill failed (R. 81) and District No. 2 was completely inundated. These cases present claims, totaling more than $1,000,000, for flood damage by persons owning property in District No. 2 (R. 13).

Between 600 and 700 actions were filed in the Oregon District Court asserting claims against the United States on account of the 1948 flood damage. Of these, some 600 cases presenting claims of 3,000 plaintiffs were filed by residents of Vanport. Twenty of the Vanport cases were consolidated as a test case and tried before the Honorable

James Alger Fee, who, finding no negligence and as a matter of law no liability in any event, gave judgment for the United States. See *Clark v. United States,* 13 F.R.D. 342, 109 F. Supp. 213 (1952). That judgment was affirmed by this Court (*Clarke v. United States,* 218 F. 2d 446 (C.A. 9 1954)) and it has since become final. While the appeal of the Vanport cases was pending Judge Fee tried the fifty-two consolidated cases (R. 125, 126) which are now before the Court and again concluded, both for reasons of fact and law, that the United States was not liable (R. 127-149). Plaintiffs have appealed.

(a) Peninsula Drainage Districts Nos. 1 and 2.

Peninsula Drainage Districts Nos. 1 and 2 are located on the outskirts of Portland along the southern bank of the Columbia River approximately five miles above the confluence of the Columbia and the Willamette (R. 16). The area between the confluence of the rivers and District No. 1 is open land subject to flood during periods of high water. District No. 1, where Vanport was located, is protected on three sides by levees: on the north along the river (R. 30), on the south along Columbia Slough (R. 31), and on the west by the so-called western embankment, a structure consisting of two railroad fills and a highway fill (R. 38). Along the eastern boundary of District No. 1 is the highway known as Denver Avenue and beyond that Peninsula Drainage District No. 2 where appellants owned property (R. 16). District No. 2 is surrounded by its own levee

system: on the north along the river (R. 16), on the south along Columbia Slough (R. 16), and on the east along an excavated channel known as the City Cut (R. 16). Along the western boundary of District No. 2 is, of course, Denver Avenue (R. 16). All this means that flood water cannot reach Denver Avenue unless one of the primary or river front levees fails or is overtopped (R. 30, 170, Exs. 1, 2).

Peninsula Drainage District No. 1, the downstream district, was organized on June 1, 1917 (R. 25). At that time the Denver Avenue fill was already in existence (R. 30) and the railway fills along the west side of the district were or were about to be constructed (R. 30). Shortly thereafter and on September 25, 1917 Peninsula Drainage District No. 2 was organized (R. 17, 302-333). During the following year the District No. 1 levees were completed (R. 30-31) and within a year or two District No. 2 had built levees on the north, south and east (R. 17), thus completing the protection for the entire area. In the period between 1936 and 1941 the Corps of Engineers, under specific Congressional direction, raised and reconstructed the north and south levees of District No. 1 (R. 32-35) and the north, south and east levees of District No. 2 (R. 19-22). The work of the Corps at District No. 1 was completed in 1941 (R. 34) and at District No. 2 in 1940 (R. 22). The levees surrounding these drainage districts do not belong to the United States (R. 22, 35).

(b) Denver Avenue and the Denver Avenue underpass.

Highway traffic going north from Portland crosses the Columbia River on the so-called Interstate Bridge. Denver Avenue and the fill supporting it were constructed in 1915 and 1916 as an approach to this bridge by Multnomah County at the expense of the Interstate Bridge Commission (R. 22). The fill was constructed on a right-of-way conveyed in fee to Multnomah County by Peninsula Industrial Company by a deed dated March 16, 1915 (R. 23, 455). The deed also granted slope easements to the county, that is, the right to locate the slopes of the fill on the adjoining property of the grantor (R. 457). The deed reserved to the grantor the right to construct public and private highway crossings (R. 458), railroad tracks (R. 458), underground pipes and conduits (R. 459) and two deep water channels "not to exceed one hundred (100) feet in width" across, under or through the right-of-way (R. 459). The deed went on to provide that it was made upon the express condition "that the said Multnomah County shall within three (3) years from the date of this conveyance construct or cause to be constructed and thereafter maintained * * * a fill and embankment" on the property "and shall, within said period, provide and thereafter maintain a public highway over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereover * * *" (R. 461-2). The highway and supporting fill, as constructed, were apparently slightly off the right-of-way, for

on December 31, 1926 a correction deed was given by Peninsula Industrial Company to the county (R. 465-8).

The Interstate Bridge Commission transferred control of Denver Avenue to Multnomah County on January 1, 1929 (R.27). On March 26, 1937 the Oregon State Highway Commission took charge of Denver Avenue and on that date Denver Avenue became an Oregon state highway (R. 27). Since then Denver Avenue has been owned by the State of Oregon and controlled by the Oregon State Highway Department (R. 28). Denver Avenue has been in regular use as a public highway since it was first constructed in 1915 and 1916 (R. 28). It is one of the principal approaches to the Interstate Bridge (R. 245) and it is heavily traveled.

Denver Avenue and the fill supporting it were referred to in the proceedings for the organization of Peninsula Drainage District No. 2. Phillip H. Dater, the district engineer, in reporting on the work to be done to protect the district lands from overflow, called attention to the fact that the Denver Avenue fill (then known as the Derby Street fill) was already in existence. "The district has for its west boundary the Derby Street fill of the Interstate Bridge, which also constitutes the east boundary of Peninsula Drainage District No. 1—this fill upon completion of District No. 2 will not act as a dike since District No. 1 will be reclaimed by its west, north, and south levees, connecting with system No. 2. It will, however, constitute an additional

element of security to Districts Nos. 1 and 2." (R. 335).

In March, 1928, the supervisors of District No. 2 proposed and the Multnomah County Court approved an amendment to the plan of reclamation for the district (Exs. 72, 73, 74). The petition notes the elevation of the Denver Avenue fill at 33 feet m.s.l., the elevation of the levees of District No. 1 at 32 feet, calls attention to the fact that the levees of District No. 2 had been constructed only to 28 feet (Ex. 72, pp. 2-3) and proposes that these levees be raised to 33 feet (Ex. 72, p. 5). This work was apparently done as proposed (R. 18) and later, as has been noted, the levees were once more rebuilt by the Corps of Engineers (R. 19-22). Neither the district nor the Corps did any work on the Denver Avenue fill (R. 18-22).

During the summer of 1942 Kaiser Company, Inc., in order to provide war housing for its shipyard employees (R. 45), contracted with the Federal Public Housing Authority to construct, within District No. 1, on a cost-plus-a-fixed fee basis the housing project known as Vanport (R. 47). The construction work was subcontracted by Kaiser to two Portland contractors, George H. Buckler and Charles B. Wegman (R. 47, Exs. 6, 7). Since Vanport was to provide housing for several thousand persons (R. 47) highway access to and from the area had to be provided. Denver Avenue, which parallels the project, was available for this purpose. But because of the heavy traffic on Denver Avenue to and from the Interstate Bridge any arrangement

whereby Vanport traffic would cross Denver Avenue traffic at grade would have been "highly dangerous" (R. 246, 283). Accordingly the Kaiser interests proposed to the Oregon State Highway Commission that an underpass be constructed through Denver Avenue, thus permitting the Vanport traffic to enter Denver Avenue without crossing it (R. 283). The Highway Commission approved this proposal (R. 246) and furnished Kaiser with detailed plans and specifications for the underpass (R. 49, 288, 290, 292). The underpass was constructed in accordance with the Commission plans (R. 49) under the supervision of a Commission engineer (R. 50). The actual work was done by Tower Sales & Erecting Company, a Portland contractor (R. 49) under a contract (R. 259-281) between Kaiser and Tower approved by F.P.H.A. (R. 281). Work on the underpass began in November, 1942, and it was completed in February or March, 1943 (R. 49-50).

Promptly upon approving the plans for the Denver Avenue underpass, R. H. Baldock, the chief engineer for the Highway Commission, wrote to Peninsula Drainage District No. 1 (R. 285) and to Peninsula Drainage District No. 2 (R. 251, 339) advising of the proposed underpass and pointing out "that the State is under no obligation to maintain the road grade as a dike facility in any respect" (R. 286). Ivan F. Phipps, president of District *No. 1,* replied, arguing that Denver Avenue was one of the dikes of District *No. 1* and asking for copies of the plans (R. 286-7).

The plans were sent to Mr. Phipps (R. 288) and a few days later the chief counsel for the Commission wrote to Mr. Phipps flatly rejecting any suggestion that Denver Avenue was a levee (R. 289). This correspondence, it will be noted, was all with District *No. 1.* As to District *No. 2,* the record shows that the district supervisors received a letter from the Highway Commission about the underpass (R. 339) and decided first that Mr. Phipps (R. 339) and later that the district secretary (R. 346) should write to the Commission. Mr. Phipps wrote only on behalf of District *No. 1* (R. 286) and the secretary apparently did nothing. The minutes of the District No. 2 supervisors state that "The Board of Directors feel that a stop-log should be erected on this underpass" (R. 347). There is nothing to show that this suggestion was ever passed along to the Commission or to Kaiser. In any event no stop-log structure was placed in the underpass either by District No. 2 or anyone else. The underpass was discussed at the annual meeting of the District No. 2 landowners held October 26, 1942, but no action was taken (R. 342). No one of the appellants ever advised the United States or any agency or employee of the United States that in his opinion the construction of the Denver Avenue underpass was a violation of his rights (R. 83).

(c) The ring levee.

About the time the Denver Avenue underpass was being constructed a semi-circular ring levee was built around and to the east of the underpass (thus within District No. 2)

on land owned by the United States (R. 58). The work was done by the contractors working on the underpass and particularly by Berke Bros. Construction Company (R. 50). The levee was built from sand in six inch lifts, that is, the sand was spread in six inch layers and compacted by the movement of bulldozers and other equipment across it (R. 50). The work was completed in April, 1943 (R. 50). In the fall of 1943, Fred Christensen, a Portland contractor, acting pursuant to arrangements with one of the Vanport subcontractors and in accordance with plans prepared by Kaiser Company, Inc., raised the elevation of the ring levee, widened its top and placed a clay blanket on its eastern or outside slope (R. 50-51, 296, 301). In the spring of 1944 employees of the Housing Authority of Portland, the lessee of the Vanport and East Vanport projects, discovered cracks and sloughs in portions of the ring levee (R. 54). In the summer or fall of that year Housing Authority employees repaired the levee by capping the crown, reworking the areas where sloughs had occurred and filling in the cracks (R. 54). There was no further difficulty with the levee (R. 418) and no further work was done on it prior to the failure (R. 54).

There is no direct evidence in the record as to why the ring levee was constructed. The contractors who built it were not called as witnesses. Apparently, however, one purpose, at least, of the levee was to protect Vanport and District No. 1 from flood waters moving into that district

from District No. 2 (R. 225, 239). The District No. 2 levees were lower than those of District No. 1 (R. 44) and could therefore have been overtopped when the District No. 1 levees were still above flood level (R. 225, 239). Inevitably, however, the ring levee also provided protection to District No. 2—witness the fact that it held the flood waters for thirty hours (R. 81), thus permitting District No. 2 to be safely evacuated (R. 81).

(d) The failure.

On the afternoon of May 30, 1948 when the elevation of the flood water was 30.8 feet m.s.l. (R. 80), the railroad and highway fills which constituted the western embankment at District No. 1 failed (R. 80) permitting the flood water to fill District No. 1 (R. 81), thereby flooding and destroying Vanport. The following morning District No. 2 was evacuated by order of the Oregon governor (R. 81).

As the flood waters filled District No. 1 they advanced across the district and began to exert pressure on the Denver Avenue fill and, by passing through the Denver Avenue underpass, on the ring levee. Trouble first developed not with the ring levee but with the fill itself at the site of a large culvert, approximately 5 feet by 5 feet in size, constructed through the fill at about ground level (R. 53). The flood water blew out the plugs in the culvert and the fill began to cave and slough (R. 184, 209-210, 217, 248).

By good luck and good management the culvert was replugged, thus averting a failure. Shortly thereafter, however, the ring levee suddenly broke, permitting the flood waters to enter District No. 2. There is conflicting testimony in this record as to whether the Denver Avenue fill would have been able to withstand the pressure of the flood water if the ring levee had not failed (R. 217, 205, 167). R. H. Baldock, the chief engineer of the Highway Commission, and Harry K. Doyle from the Corps of Engineers, both of whom participated in the Denver Avenue flood fight, testified that in their opinion the Denver Avenue fill would itself have failed if the ring levee had not done so (R. 217, 249).

The failure of the ring levee permitted the flood waters to advance across District No. 2 from Denver Avenue to Union Avenue, another highway fill so located that it bisects the district in a diagonal fashion (R. 55). Union Avenue held the water for two or three hours; then it too failed (R. 81) permitting the flood to inundate the entire district and to do the damage for which appellants seek compensation (R. 81).

Summary of the Argument

The judgment below should be affirmed:

1. Denver Avenue is and always has been a highway and nothing else. It was constructed for highway purposes; for more than thirty years it has been consistently used for

highway purposes; and as a result of that continuous use it is dedicated to the public for highway purposes. The construction of the Denver Avenue underpass was a legitimate highway measure necessary for the safety of the traveling public. The underpass was constructed with the consent and under the supervision of the Oregon State Highway Commission. By express provision of the Oregon statutes that Commission has full jurisdiction and control over Denver Avenue and all other Oregon state highways. The construction of the underpass was therefore in all respects lawful and proper.

2. Denver Avenue is not and never has been a levee or considered to be such by appellants or by Drainage District No. 2. But even if appellants had hoped or expected that Denver Avenue would provide flood protection for their properties if the occasion arose, that hope or expectation would not and did not obligate the State of Oregon, the owner of Denver Avenue, to maintain Denver Avenue as a levee for the benefit of appellants or to refrain from taking such measures in connection with Denver Avenue as might be necessary or appropriate for the safety of the traveling public. The paramount right in connection with Denver Avenue is and was the right of the public to safe travel.

3. Appellants have no interest in and no rights in connection with Denver Avenue. Appellants do not own the fill, the land on which it rests, or the adjoining property. Appellants have made no contribution to the cost of build-

ing or maintaining Denver Avenue. They have no rights by statute or by contract. The right-of-way deed did not obligate Multnomah County or the State of Oregon as its successor to maintain Denver Avenue as a levee and appellants are not entitled to the benefit of that obligation even if it existed. The obligations under the right-of-way deed are, moreover, expressed as conditions subsequent, the only remedy for a violation of which would be a forfeiture of the right-of-way to Peninsula Industrial Company—a forfeiture which has not been and cannot now be declared. Moreover, the right-of-way deed itself provides for public and private highway crossings "over, under or across" the right-of-way. The construction of the Denver Avenue underpass was not a violation of the deed provisions and even if it had been it would not have been a violation of any right of appellants.

4. The Denver Avenue underpass was not constructed by the United States or its employees and the negligence or wrongful conduct, if any, of the employees of government contractors is not actionable under the Tort Act.

5. The United States had no obligation to construct or maintain a levee at the site of the underpass or to take any action whatever to protect appellants from flood damage. The obligation to provide flood protection for appellants' property rested with appellants themselves or with Peninsula Drainage District No. 2. There has been no proof, moreover, of any negligence or wrongful conduct in connection

with the construction or maintenance of the ring levee. The ring levee failed under pressure of flood waters approaching from the west. No one, including appellants, foresaw and in the exercise of due care no one could have foreseen that the western embankment of District No. 1 would fail, thus permitting flood waters to approach the ring levee from the west.

6. The ring levee was not constructed or maintained by employees of the United States and the negligence or wrongful conduct, if any, of the employees of government contractors is not actionable under the Tort Act.

7. The cause of the flood damage to appellants' property was the failure of the western embankment at Peninsula Drainage District No. 1 (which was not owned or maintained by the United States and for which the United States was in no way responsible) operating on conditions created by the failure of appellants and Peninsula Drainage District No. 2 to provide flood protection for appellants' lands. The 1948 Columbia River flood was an "act of God" for which the United States was in no way responsible.

8. Appellants assumed the risk of flood damage by failing during the long period subsequent to the construction of the Denver Avenue underpass and the ring levee to provide further flood protection for their lands. Most if not all of the appellants, moreover, acquired or improved their properties after the Denver Avenue underpass and

the ring levee were constructed, thereby deliberately assuming whatever risks were inherent in the situation.

9. These cases are pure afterthought. No one of the appellants prior to the 1948 high water ever advised the United States that the United States had any flood protection obligations to him, or that the construction of the Denver Avenue underpass was a violation by the United States of his rights, or that the ring levee was inadequate or improperly maintained, or that there was any risk of flood waters approaching Denver Avenue from the west.

10. The United States has no connection with these cases except that the United States decided to arrange for the construction of Vanport and acquiesced in the decision of the Oregon State Highway Commission and the Vanport contractors to build an underpass through Denver Avenue and in the subsequent decision of the Vanport contractors to construct a ring levee about this underpass. Everything done by the United States called, therefore, for an exercise of discretion as to which there can be no liability under the Tort Act.

11. 33 U.S.C.A. 702(c), providing that the United States shall not be liable for flood damage, is an absolute bar to these claims.

12. The court below had no jurisdiction of these claims since the cause of action, if any, accrued prior to January 1, 1945 (28 U.S.C.A. 1346(b)).

The District Court, recognizing the force of these contentions, gave judgment for the United States. That judgment was correct.

Argument

1. Denver Avenue is and always has been a highway and not a levee.

Appellants rest their case fundamentally on two propositions: that Denver Avenue is a levee and that appellants have rights in Denver Avenue which were violated by the construction of the underpass. Neither has any support in the record. With respect to Denver Avenue the District Court found:

> "8. Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellant wall or structure. The plan for Reclamation of District No. 2 specifically stated that no reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection. Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue. In the period between 1934 and 1944, the United States, acting through the Corps of Engineers, reconstructed the north, south and east levees of District No. 2. District No. 2 approved the plans for the work but made no request that Denver Avenue be strengthened as part of the protective works. Denver Avenue was built and has ever since been used for highway purposes. Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue as a levee or for flood protection purposes." (R. 142-3)

The finding that Denver Avenue "was not intended to be a levee" (R. 142) has overwhelming support in the record. Indeed, the arguments of appellants notwithstanding, there is in this record no evidence whatever that Denver Avenue was ever intended to be a flood protection structure. It is and always has been a highway and nothing else. There are many reasons:

First. Denver Avenue was built exclusively for highway purposes. It was built by the County of Multnomah at the expense of the Interstate Bridge Commission as one of the approaches to the Interstate Bridge (R. 22). The Interstate Bridge Commission obviously had nothing to do with levee construction.

Second. Denver Avenue was built before either drainage district was organized (R. 22, 17, 25) and therefore at a time when the land on both sides of Denver Avenue was subject to flood. The fact that no one was then planning to reclaim this land is demonstrated by the provision of the right-of-way deed for two deep water channels across the right-of-way (R. 458-9).

Third. The right-of-way deed makes it crystal clear that Denver Avenue and the Denver Avenue fill were to be constructed not for levee but for highway purposes. The deed refers repeatedly to the fact that the land is to be used for a highway. It provides, for example, with respect to certain deep water channels that the grantor "shall con-

struct said crossings in such manner as not unreasonably to interfere with the traffic over said parcels of land *as a highway*"* (R. 459); it provides that certain connecting fills "shall be constructed, maintained and used in such manner as not to interfere with the convenient use or occupation *of any roadway* maintained or to be maintained by Multnomah County or the public on either of said parcels of land" (R. 460); it requires the county to "provide and thereafter maintain *a public highway over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereover*" (R. 461-2); and finally, it provides "that no toll shall ever be collected by the said Multnomah County for any travel *over any highway* constructed over Parcel B as herein described" (R. 462). Moreover, the correction deed of December 31, 1926 (R. 465) says specifically that the grant was for a highway. It recites that the first conveyance was *"for highway purposes"* (R. 465); that *"it was the intention of the parties that the county was to construct certain fills and highways upon said parcels"* (R. 465); and that the county should *"have no interest in land not used or intended to be used for said highways"* (R. 465). This repeated reference in the deeds to highways and highway purposes is to be compared with the fact that nowhere in the deeds is there any mention whatever of levees, dikes, floods or flood protection. Indeed, the deeds affirmatively

*Emphasis is supplied throughout this brief unless otherwise noted.

demonstrate that no one intended or anticipated that Denver Avenue would serve as a levee or that the fill would be maintained in a continuous and unbroken fashion. The March 16, 1915 deed carefully reserves to the grantor and its successors* a series of rights wholly inconsistent with any purpose to use the Denver Avenue fill as a levee. It is provided that the grantor shall have:

> "(a) The right to dedicate as provided by law public highway crossings and to pay out and use private highway crossings *over, under or across* either or both of said parcels of land hereby conveyed * * *
>
> "(b) The right to cross with railroad tracks for industrial and switch track purposes *under, over or at grade* either or both of the parcels of land hereby conveyed * * *
>
> "(c) The right to construct and to maintain at the expense of the grantor or its successors *one (1) crossing not to exceed one hundred (100) feet in width under and through each of said parcels of land hereby conveyed, to be used by the grantor for a deep water channel,* the location of said crossings on each of said parcels of land to be designated by the grantor * * *
>
> "(d) The right to cross and recross said parcels of land hereby conveyed with *underground* pipes and conduits and with overhead or *underground* telephone, telegraph, electric light, power or other wire crossings * * *" (R. 458, 459).

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*There is good reason to believe that the United States is the successor in interest to Peninsula Industrial Company, the grantor of the right-of-way deed. That company at the date of the deed owned the property adjoining the right-of-way (R. 457, 316). The land adjoining the right-of-way now belongs to the United States (Exs. 64, 76, 77, 78).

In the face of these provisions for public and private highway and railroad crossings, underground pipes and conduits and two deep water channels 100 feet in width through the Denver Avenue fill, it is difficult to take seriously the suggestion that the fill was intended to act as a levee.

Fourth. Denver Avenue has never been considered to be a levee.* The organization papers for District No. 2 recognize that Denver Avenue was not expected to act as a levee. The district engineer in reporting on the work to be done by the district (R. 334) referred to the Denver Avenue or Derby Street fill, as it was then known:

> "The district has for its west boundary the Derby Street fill of the Interstate Bridge, which also constitutes the east boundary of Peninsula Drainage District No. 1—*this fill upon completion of District No. 2 will not act as a dike* since District No. 1 will be reclaimed by its west, north and south levees connecting with system No. 2. It will, however, constitute an additional element of security to Districts Nos. 1 and 2." (R. 335).

This seems clear enough: Denver Avenue is not a dike; protection from the west is to be provided by the levee system of District No. 1. Pursuant to this understanding

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*Appellants argue that by building the ring levee the Vanport contractors recognized that Denver Avenue was a flood protection structure. This assumes far too much. The construction of the ring levee implies nothing beyond the obvious fact that the Denver Avenue fill *as a highway fill* might well (as it did) provide temporary protection if the occasion arose, thereby permitting an orderly evacuation of the area.

the district engineer recommended (R. 336) and the districts installed a large, open culvert, 5 feet by 5 feet, through the Denver Avenue fill so that the District No. 1 pumping plant could serve both districts (R. 337, 25). Many years later this culvert was plugged (R. 53), but the fact that for at least fifteen years it remained open demonstrates that no one expected Denver Avenue to act as a levee.

In March, 1928, District No. 2 asked court approval for an amendment to its plan of reclamation (Ex. 72). The petition recites "the construction of dikes and levees surrounding the District to an elevation of twenty-eight feet" (Ex. 72, p. 2), the construction of the Derby Street approach to the Interstate Bridge to an elevation of thirty-three feet (Ex. 72, p. 2) and the construction of the levees of District No. 1 to an elevation of thirty-two feet (Ex. 72, p. 2) and proposes that: "The dikes and levees surrounding said Peninsula Drainage District Number Two shall be increased in height from the present elevation of twenty-eight feet at the top to an elevation of not exceeding thirty-three feet at the top." (Ex. 72, p. 5). The petition was granted as prayed (Ex. 73). It will be noted that in these proceedings papers Denver Avenue is not included among "the dikes and levees surrounding said Peninsula Drainage District Number Two".

The subsequent history of Denver Avenue is all to the same effect. On March 26, 1937 control of Denver Avenue was transferred to the Oregon State Highway Commission

(R. 27) and ever since Denver Avenue has been owned by the State of Oregon and controlled by the Commission (R. 28)—an arrangement entirely appropriate for a highway but entirely inappropriate for a district levee. In the period from 1936 to 1940 the Corps of Engineers worked extensively on the levees of both drainage districts (R. 19-22, 32-35), but as the court below pointed out, no one ever suggested that the Corps do any work on the Denver Avenue fill (R. 143). Finally, when in connection with the construction of the underpass it was suggested by District No. 1 that Denver Avenue should be regarded as a dike (R. 287), that suggestion was rejected promptly and emphatically by counsel for the Highway Commission (R. 289):

> "The structure through which it is proposed to make the underpass is a highway grade and has always been such since its construction. It is my opinion that no use of such highway grade by an irrigation district imposes any liability on the State or the Highway Department; and, therefore, until I am otherwise convinced, I shall advise the Highway Commission that it may, without liability, use the Denver Avenue approach which is a highway grade for any use consistent with and which contributes to public travel and public convenience."

This has always been the position of the Commission (R. 247).

Thus it turns out that for a host of reasons the court below was correct in concluding that Denver Avenue was a highway and not a levee: because it was built exclusively

for highway purposes before either district was organized; because the right-of-way deeds make it clear that the fill was constructed for highway and not levee purposes; and because Denver Avenue has never been considered to be or maintained as a levee. The alleged failure, therefore, to maintain the fill as a levee was in no way wrongful.

2. The construction of the Denver Avenue underpass was lawful and proper.

The fact that Denver Avenue is a highway makes the construction of the underpass altogether lawful and proper. In 1942-3 when the underpass was constructed Denver Avenue was an Oregon state highway (R. 27) owned by Oregon and controlled by the State Highway Commission (R. 28). The Highway Commission determined that the underpass was necessary for safety reasons. R. H. Baldock, the Oregon State Highway engineer, testified as follows:

> "Q. What was the purpose of the proposed underpass?
>
> A. To give access to the town of Vanport.
>
> Q. Was this a proper purpose from a highway and traffic point of view?
>
> A. It was.
>
> Q. *Was there some safety factor involved in providing for the underpass?*
>
> A. *It would have been highly dangerous to try to make the access without separating the opposing streams at grade.*

Q. *Did that require the construction of the underpass?*

A. *It did.*

Q. Did you approve the proposal for the construction of the underpass?

A. I did.

Q. Did your office prepare the plans for the construction of the Denver Avenue underpass?

A. Yes.

Q. Did an engineer from your office supervise the construction of the underpass?

A. Yes." (R. 246)

Since, as this testimony makes clear, the Commission not only concluded that the underpass was necessary for safety reasons but actually prepared the plans and supervised the work, there can be no doubt that the construction of the underpass was lawful. For under the Oregon statutes the jurisdiction of the Oregon State Highway Commission over state highways such as Denver Avenue is plenary and absolute. In 1942, 114 O.C.L.A. 100 (3 Or. Rev. Stat. 366.205) provided:

> "The commission shall have full power to carry out the provisions of this act, and said commission hereby is given general supervision and control over all matters pertaining to the selection, establishment, location,

> construction, improvement, maintenance, operation and administration of state highways, the letting of contracts therefor, the selection of materials to be used therein, and all other matters and things necessary or proper or deemed necessary or proper for the accomplishment of the purposes of this act, and said commission is likewise given complete jurisdiction and authority over all state parks, recreational grounds, or places acquired by the state for recreational purposes."

This broad grant of authority was confirmed by Section 115 (3 Or. Rev. Stat. 366.220):

> "§ *100-115. Specific powers and authority of highway commission.* In addition to such general powers as may be necessary and incident to the performance of its duties under the provisions of this act the commission hereby is given specific power and authority to do and accomplish the following things:
>
> "(1) System of Highways. Select, establish, designate, construct, maintain, operate and improve or cause to be constructed, maintained, operated and/or improved a system of state highways within the state of Oregon, which highways shall be designated by number and by the point of beginning and the terminus thereof."

The Commission, as the statute says, has "general supervision and control over all matters pertaining to the * * * construction, improvement, maintenance, operation and administration of state highways * * *". Under this broad grant of authority the Commission certainly had full power to authorize construction of the underpass. For

it is, of course, well settled that the state, acting through the appropriate agency, has plenary power over the highways, including authority to take appropriate safety measures. "The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." *Cox v. New Hampshire,* 312 U.S. 569, 574 (1941). "The Legislature has full authority over the highways of the State and may lay out their routes and regulate their use." *Marshall v. State,* 171 S.W. 2d 269, 270 (Tenn. 1943). "That the Legislature exercises plenary control over public highways, whether they be public, state or county roads or streets in municipalities, is established beyond question in this state." *Roney Inv. Co. v. City of Miami Beach,* 174 So. 26, 29 (Fla. 1937). For Oregon cases recognizing the broad powers of the Highway Commission, see *Tomasek v. State,* 248 P. 2d 703 (Or. 1952); *Cabell v. City of Cottage Grove,* 130 P. 2d 1013 (Or. 1943), 144 A.L.R. 286; *Warren v. Bean,* 115 P. 2d 167 (Or. 1941). Since Denver Avenue belonged to Oregon and since the Highway Commission had full power under Oregon law to regulate its use, how can it be said that the construction of the underpass, approved by the Commission as a necessary safety measure, was in any way unlawful?

3. Even if the construction of the Denver Avenue underpass had been unlawful, no right of appellants would have been violated.

Appellants have established no interest in or claim upon Denver Avenue; accordingly even if the construction of the underpass were for some reason wrongful appellants could not be heard to object. Appellants are individuals owning property at various locations in Peninsula Drainage District No. 2. No one of the appellants owns or claims to own Denver Avenue itself or the land upon which it rests. The highway, the fill supporting it and the right-of-way beneath it all belong to the State of Oregon (R. 28). The fill at its base is wider than the right-of-way but that is of no consequence for at least two reasons: first, because the right-of-way deed contains the customary slope easement, that is, "the right to place the toe of the slopes of any embankments upon the real property belonging to the grantor adjoining that described in Parcels A and B herein" (R. 457), and second, because beginning in 1942 the owner of the property adjoining the right-of-way was the United States and not the appellants or any one of them (R. 58, Exs. 76, 77, 78). No one of the appellants has, therefore, any property right which the construction of the underpass could be said to violate.

Appellants argue for some sort of "easement" whereby Multnomah County was obligated to maintain Denver Ave-

nue as a levee. No such "easement" exists and even if it did appellants could not claim the benefit of it.

First. The parties to the right-of-way deed, as this brief has pointed out, never intended that Denver Avenue should be a levee. A fill to be intersected by highway and railroad crossings and two deep water channels 100 feet in width cannot have been intended as a levee.

Second. The right-of-way deed says nothing whatever of floods, levees or flood control. The obligation to construct and maintain the fill is by its very terms an obligation to "maintain a public highway over said Parcel B" (R. 462). This obligation, expressed in the deed as a condition subsequent, must under the Oregon cases be strictly construed with all doubts resolved against any restrictions limiting or forbidding any legitimate use of the property for highway purposes. "Conditions subsequent are not favored in law, and are to be strictly construed, because they tend to destroy estates, and generally all doubts are resolved against restrictions on the use of property by the grantee or devisee * * *". *Gange v. Hayes,* 237 P. 2d 196, 200 (Or. 1951). See also *Clark v. Jones,* 144 P. 2d 498, 500 (Or. 1943) and *City of Portland v. Terwilliger,* 19 Pac. 90, 94 (Or. 1888). Appellants, contrary to the cases, are not only asking the Court to resolve all doubts in favor of, rather than against, a supposed restriction on the use of the property but actually to create that restriction without a word in the deed to support it.

Third. The right-of-way deed in providing for a highway impliedly authorized all measures, including underpass construction, which might be appropriate to that end. "The dedication of a street to public use authorizes any ordinary use for street purposes * * *". *Finch v. Riverside Ry. Co.,* 87 Cal. 597, 598 (1891). The deed itself recognizes that the construction of "public highway crossings * * * over, under or across" the right-of-way might be appropriate (R. 458). Indeed, any provision in the right-of-way deed which might be construed to limit the power of the Highway Commission to build the underpass or to take other appropriate highway measures, would be void as repugnant to the grant. *Wills v. Los Angeles,* 209 Cal. 448 (1930).

Fourth. The Oregon courts have held that a breach of a condition subsequent which is merely technical or which is pursuant to an exercise of the police power will not forfeit the property. *Clark v. Jones,* 144 P. 2d 498, 500 (Or. 1943); *City of Portland v. Terwilliger,* 19 Pac. 90, 95 (Or. 1888). The Denver Avenue underpass was built as a safety measure for the protection of the traveling public. It was, therefore, a proper exercise of the police power of the State. This means, under Oregon law, that there has been no actionable violation of the deed provisions.

Fifth. Appellants have no standing to complain about a violation, if any, of the deed provisions. Appellants argue that they are the successors in interest to Peninsula Industrial Company and therefore entitled to take advantage of the

deed provisions reserving rights to the grantor and its successors. There is, however, no evidence in this record to support that argument—nothing from which it could be concluded that appellants or any of them are in actual fact the successors in interest to Peninsula Industrial Company. At the trial no one of the appellants identified the property he owned in District No. 2 or made any effort to prove that Peninsula Industrial Company was in truth his predecessor in interest. The only title evidence before the Court is the description of property ownerships contained in the District No. 2 organization papers. Those papers show that as an original matter the district lands were not owned by Peninsula Industrial Company but by forty-six different interests (R. 307-29). How then can it be assumed that appellants or any of them succeeded to the particular ownership of Peninsula Industrial Company?

Moreover, if one of the appellants did succeed in proving title through Peninsula Industrial Company he would not on that account, under the Oregon cases, be entitled to assert a position based on the right-of-way deed. Since the obligation of the grantee under the deed is stated as a condition subsequent and not as a covenant the only remedy for breach of the condition is a right of re-entry. "If the language imports a condition merely, and there are no words importing an agreement, it is not enforceable as a covenant." 26 C.J.S. 473. "Ejectment is the proper remedy to be employed by the grantor of real property to recover the same

for breach of a condition subsequent and may be maintained without previous demand for possession." *School District No. 21 v. Wallowa County,* 142 Pac. 320, 320 (Or. 1914). *Seeck v. Jakel,* 141 Pac. 211 (Or. 1914). But in Oregon this right of re-entry is not assignable and it does not pass with a conveyance of the grantor's property. "Because the grantor may waive his right to insist that the condition subsequent has been broken, his chose in action in the premises is classed as a personal privilege to be asserted only by himself or his heirs. It is not assignable, and, until he actually recovers the land as upon breach of the condition, his deed confers no right upon his subsequent grantee." *School District No. 21 v. Wallowa County,* 142 Pac. 320, 320 (Or. 1914). *Wagner v. Wallowa County,* 148 Pac. 1140 (Or. 1915); *Magness v. Kerr,* 254 Pac. 1012, 1014 (1927). This rule is obviously fatal to any suggestion that appellants can assert any claim under the right-of-way deed. As a matter of fact it seems unlikely that at this late date Peninsula Industrial Company itself could claim a violation of the condition (see *Booth v. County of Los Angeles,* 124 Cal. App. 259 (1932)), particularly if, as appellants contend, Peninsula Industrial Company has transferred its interest in the district property. In Oregon that transfer is itself a waiver of the right of re-entry. See *Wagner v. Wallowa County,* 148 Pac. 1140, 1144 (Or. 1915).

For these reasons it seems clear there has been no violation of the deed provisions and even if such a violation

existed appellants could make nothing of it.

Appellants, having no property interest in Denver Avenue and, for the reasons indicated, no rights under the right-of-way deed, argue that the construction of the underpass was a violation of 123 O.C.L.A. 216 (4 O.R.S. 551.140). That section reads:

> "REALIGNMENT OF DIKES BY LANDOWNERS: PROCEDURE; EXPENSE: OWNERSHIP OF NEW DIKE. Any person through whose lands dikes shall have been constructed under this act may be allowed to construct a dike upon new lines between any two points on the original line. In such case the owner shall file application with the county court, giving a plat of the proposed change, and indorsed by the superintendent of the district. If the court is satisfied that the change is not detrimental to the district, the application shall be granted. The applicant shall construct the new dike at his own expense, and up to the standard of the original, of which fact the superintendent shall be the judge. The dike thus constructed shall become the property of the district in the same manner as the original, and subject to the same regulation, and the right of way of the original dike thereon becomes vacated."

Obviously this provision has nothing whatever to do with this case. The statute relates only to dikes "constructed under this act", that is, under the provisions of the Oregon law authorizing the construction of dikes by irrigation and drainage districts. Denver Avenue was not constructed as a dike; it was not constructed by an irrigation or drainage

district; and it was not, therefore, constructed under the provisions of "this act". Section 216 relates, moreover, only to dikes belonging to an irrigation or drainage district. It provides that upon realignment the new dike shall belong to the district "in the same manner as the original". Denver Avenue did not, of course, belong to District No. 2. Finally, there is nothing in the statute to suggest that even if it were violated the consequence would be that appellants would be entitled to recover their flood losses from the United States. As appellants point out, the court below did not comment on this statute—for the very good reason, no doubt, that it seems self-evident the statute has nothing to do with this case.

Appellants argue that they or District No. 2 "adopted" the Denver Avenue fill for flood protection purposes. Nothing in the record supports that argument. The Denver Avenue right-of-way lies outside and beyond the boundaries of District No. 2 (R. 305); the Dater report says specifically that Denver Avenue is not a dike (R. 335); the proceedings for the revision of the plan of reclamation carefully distinguish between Denver Avenue and the district levees (Exs. 72, 73, 74); and there is no proof whatever that appellants individually placed any reliance on the Denver Avenue fill. No one of the appellants objected to the construction of the underpass or claimed any violation of his rights on that account (R. 83).

But even if this were wrong, if the district or appellants

had hoped or expected that Denver Avenue would provide flood protection if the occasion arose, it would make no difference. Appellants by living behind the Denver Avenue fill, hoping, believing or expecting, that it would act as a dike did not thereby obligate the owners of Denver Avenue to maintain the fill as a levee. This is both self-evident and well settled. "The fact that a land owner avails himself of the right to repel vagrant waters of a river by embankments does not, in the absence of some further circumstances or set of circumstances, impose upon him any obligation to maintain such obstruction, or to refrain from restoring natural conditions." *The Weinberg Co. v. Bixby,* 185 Cal. 87, 101, 196 Pac. 25 (1921). "But it is inconsistent with any sense of fairness or logic to assume that a landowner must by the maintenance of an artificial embankment protect his neighbor below from waters of any character which otherwise would flow upon the lower proprietor's estate." *Vollrath v. Wabash R. Co.,* 65 F. Supp. 766, 772 (D.C. Mo. 1946). "The only basis upon which plaintiff could rightfully claim injury for this action would be on the theory that the spillway, having once been set at a higher elevation and with a narrower outlet, gave plaintiff a vested right in having it maintained in that original condition. We believe this position is untenable." *Ireland v. Henrylyn Irr. Dist.,* 160 P. 2d 364, 365 (Colo. 1945). See also *Whitcher v. State,* 181 A. 549, 552 (N.H. 1935); *Branch v. City of Altus,* 159 P. 2d 1021

(Okla. 1945); *Savoie v. Town of Bourbonnais,* 90 N.E. 2d 645 (Ill. App. 1950). This must be so. Surely no court can be expected to hold that a landowner, merely by hoping or expecting that his neighbors will provide him with flood protection, can obligate his neighbors to do so.

This is particularly clear under the circumstances of this case. The paramount right in Denver Avenue, the right that transcends every other claim on the property, is the right of the public to safe travel. This means that even if Denver Avenue could be said to have some secondary or incidental levee purposes, those purposes would have to yield to the paramount right of the public to travel in safety. The authorities are clear and unequivocal. "The streets belong to the public and are primarily for the use of the public in the ordinary way." *Packard v. Banton,* 264 U.S. 140, 44 S. Ct. 257, 259 (1924). "Streets and highways are dedicated, secured and maintained primarily for public transit, and must be so preserved. All other uses thereof must be subordinated or yield to the right of free and unobstructed passage." *Hanson v. Hall,* 279 N.W. 227, 229 (Minn. 1938). "By the location of highways and other public ways the public acquire 'a right of passage for the purpose of travel over the land taken with all the powers and privileges necessarily implied as incidental to the exercise of that right.'" *City of Boston v. A. W. Perry, Inc.,* 22 N.E. 2d 627, 629 (Mass. 1939). "Public highways are created and dedicated to public use for the purpose of

handling necessary traffic thereon and the legislature has plenary power over the regulation thereof including the right to prohibit parking thereon altogether or to place such restrictions upon the same as it deems for the safety and best interests of the public." *Kelly v. Anderson,* 249 P. 2d 833, 835 (Ariz. 1952). "That the public is entitled to a proper viatic use of a highway is too well established to need argument or citation of authority." *Furlong v. Deringer,* 13 A. 2d 186, 187 (Vt. 1940). See also: *State v. Gamelin,* 13 A. 2d 204 (Vt. 1940); *State v. F. W. Fitch Co.,* 17 N.W. 2d 380 (Ia. 1945); *Wolfe v. City of Providence,* 74 A. 2d 843 (R. I. 1950); *Hildebrand v. Southern Bell Telephone & Tel. Co.,* 14 S.E. 2d 252 (N.C. 1941); *Foster's Inc. v. Boise City,* 118 P. 2d 721 (Idaho 1941). The rights of the public extend to the entire highway structure, not merely the traveled portion. See *Simpson v. Adkins,* 53 N.E. 2d 979, 984 (Ill. 1944); *Miller v. Pennsylvania-Reading Seashore Lines,* 198 A. 848, 850 (N.J. 1938); *Otten v. Big Lake Ice Co.,* 270 N.W. 133, 135 (Minn. 1936).

The right of travel thus vested in the public is the right to travel in reasonable safety. "It [the right of passage] also includes the right to a reasonably safe passage, which may be enforced through the police power even though the abutting owners' rights be diminished thereby." *Breinig v. County of Allegheny,* 2 A. 2d 842, 847 (Pa. 1938). "The right to use the highways and streets for purposes of travel, however, is not an absolute and unqualified one, but may

be limited and controlled by the state in the exercise of its police power, whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people, and is subject to such reasonable and impartial regulations adopted pursuant to this power as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement, and to provide for their safety while using it." *State v. Karel,* 180 So. 3, 6 (Fla. 1938). "The state may prescribe regulations adapted to conserve its highways as to cost of construction and maintenance, to reasonably restrict their use in favor of normal traffic, and to promote the safety of all who may use them." *State v. John P. Nutt Co.,* 185 S.E. 25, 29 (S.C. 1935). See to the same effect *In Re Opinion of the Justices,* 8 N.E. 2d 179 (Mass. 1937); *Joyner v. Matthews,* 68 S.E. 2d 127 (Va. 1951).

This public right to safe travel is the paramount consideration and the rights of all others, including the abutting property owners, must yield to it. "While the county's right of way is an easement, neither the owners of adjoining land nor plaintiff may use the highway for any purpose inconsistent with the right of the public to its full and free enjoyment as such. Such rights as plaintiff and adjoining land owners may have are subordinate to, and must yield to the public use." *Airways Water Co. v. Los Angeles County,* 236 P. 2d 199, 200 (Cal. App. 1951). "It is settled that the rights of abutting property owners are subservient

to the rights of the public in the full enjoyment of its public ways." *Levy v. Curlin,* 241 S.W. 2d 997, 999 (Ky. App. 1951). "This use [by the lessee of adjoining property] could have been abated if inconsistent with the full enjoyment of the right of way by the public."*Carlton v. Pacific Coast Gasoline Co.,* 242 P. 2d 391, 395 (Cal. App. 1952). "But this right [of the abutting owner] must be exercised subject to the protection of the public which may be using the highway or sidewalk, and it may be regulated under the police power in the interest of safety." *Breinig v. County of Allegheny,* 2 A. 2d 842, 847 (Pa. 1938). Indeed, any use of the highway properties inconsistent with legitimate highway purposes is a nuisance and may be abated as such. See *People v. Henderson,* 194 P. 2d 91 (Cal. App. 1948); *Scott v. Reynolds,* 29 S.E. 2d 88 (Ga. App. 1944); *Southeastern Pipe Line Co. v. Garrett,* 16 S.E. 2d 753 (Ga. 1941); *Carson v. Baldwin,* 144 S.W. 2d 134 (Mo. 1940). Thus appellants must argue not only that their silent hope that Denver Avenue would serve as a flood protection structure obligated Oregon to maintain it as such but also that the obligation thus created transcended the paramount right of the public to safe travel. This is to claim a great deal for an expectation never voiced by appellants, never accepted or recognized by anyone.

4. The Denver Avenue underpass was not constructed or maintained by the United States or its employees.

Jurisdiction to hear these claims depends entirely upon

the Tort Claims Act, 28 U.S.C.A. 1346(b). That jurisdiction is limited to claims for loss of property "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *". "Employee of the Government" is defined by 28 U.S.C.A. 2671 to include employees of Federal agencies and "Federal agency" is defined to include the ordinary departments of the Government, but not, by express provision, "any contractor with the United States."* There neither is nor could be any claim in this case that employees of the United States constructed the Denver Avenue underpass. That work was done by Tower Sales & Erecting Company, a subcontractor of Kaiser Company, Inc. (R. 49, 259) pursuant to plans furnished by and under the supervision of the Oregon State Highway Commission (R. 49). The permit for the construction of the underpass runs from the Oregon State Highway Commission to F.P.H.A. (R. 293) and F.P.H.A. approved the subcontract between Kaiser and Tower (R. 281). But no one could claim that the issuance of the permit or the execution of the contract damaged anyone. The alleged wrong is the interruption of the fill by

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*The Tort Act adopts the *respondiat superior* theory of liability. *National Mfg. Co. v. United States,* 210 F. 2d 263, 278 (C.A. 8 1954); *Christian v. United States,* 184 F. 2d 523 (C.A. 6 1950); *King v. United States,* 178 F. 2d 320 (C.A. 5 1949). It is not to be expected, therefore, that the United States would consent to become liable for the negligence of the employees of government contractors. The common law has always recognized that a master cannot be held for the negligence of the employees of independent contractors.

the actual construction of the underpass. That wrong, if it was one, was not committed by the employees of the United States and by express provision of the statute there is no Tort Act jurisdiction to consider claims based upon wrongs done by Government contractors. This must mean that the court below had no jurisdiction to consider these claims.

5. There was no negligence or wrongful conduct in connection with the construction and maintenance of the ring levee.

Two things are fundamental in considering the ring levee and its construction: first, that absent failure or overtopping of one of the primary (river front) levees no water could reach Denver Avenue or the ring levee; and, second, that no one foresaw and in the exercise of due care no one could foresee a failure of the primary levees. This was the fundamental finding of the District Court in the Vanport cases (109 F. Supp. 213,227) and it was a fundamental conclusion of this Court on the appeal of those cases. "Much evidence was to the effect that the sudden failure of an embankment of the size, age, and past performance of the western embankment was both unprecedented and unforeseeable." (218 F. 2d 446, 451). There is nothing to the contrary in this record. All the witnesses agree that no failure of the western embankment was or could have been foreseen (R. 219, 224, 237, 414, 423) and the court below so found.

> "9. The flood water which inundated plaintiffs' property approached Denver Avenue and the ring levee from the west. In the exercise of due care, there was

> no reason to anticipate a failure of the western embankment or any embankment of District No. 1, and hence no reason to anticipate that flood waters would ever approach Denver Avenue and the ring levee from the west. No one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke. The failure of the ring levee and the inundation of the plaintiffs' property resulted from a set of circumstances unforeseen by anyone, including plaintiffs, and which in the exercise of due care could not have been foreseen." (R. 143-4)

In the absence of any reason to anticipate a failure of one of the primary levees, due care and good engineering practice did not require the construction of the ring levee or any secondary levee whatever at the site of the underpass (R. 224-5, 238). The Corps of Engineers, which is responsible for most of the levee work in the United States, does not build secondary levees (R. 223, 237). The Corps takes the good sense position that the available funds should be spent not on secondary levees but on raising and strengthening the primary levees (R. 223, 237). The consequence is that secondary levees are rarely, if ever, built and there are no standards of design available for them (R. 223, 237). Appellants' expert witnesses did not say that due care and good engineering practice require the construction of secondary levees; nor did they undertake to provide standards to which such levees should be built. How can the Court be asked to say that this particular secondary levee was neg-

ligently constructed when the engineering profession does not build secondary levees and has no standards for their construction?

Just why the ring levee was built no one knows, but a reasonable guess can be made. The levees at District No. 2, at their lowest elevation, were 1.7 feet below the levees of District No. 1 (R. 44). This meant that a flood might conceivably overtop the District No. 2 levees at a time when the levees of District No. 1 were still above flood elevation (R. 225, 239). In that event, if the Denver Avenue underpass was unprotected, water from District No. 2 could flow into and flood District No. 1. It was apparently against this very remote possibility and in the exercise of what was truly a superabundance of caution that the ring levee was constructed by the Vanport contractors (R. 226, 239). The Government experts testified this was a reasonable thing to do (R. 225, 239). There is no contrary testimony.

In any event and for whatever reason the ring levee was built during March and April 1943 by the contractors who worked on the Denver Avenue underpass and particularly by Berke Bros. Construction Company (R. 50). In the fall of 1943, George H. Buckler, one of the Vanport contractors, made arrangements with Fred Christensen, a Portland contractor, to raise the elevation of the ring levee, to widen its top to 12 feet, and to lay a clay blanket on its eastern or outside slope (R. 51). This work was done by Mr. Christensen in August and September 1943 in accordance with plans

furnished by Kaiser Company, Inc. (R. 51, 296, 301). In the spring of 1944 employees of the Housing Authority of Portland, the lessee of Vanport and East Vanport, discovered cracks and sloughs in portions of the ring levee (R. 54). Later that year the Housing Authority employees repaired the levee by capping the crown, reworking the areas where sloughs had occurred, and filling in the cracks (R. 54). This work was apparently done in a satisfactory manner for no further sloughs or cracks developed (R. 418) and no further settlement took place prior to the 1948 failure (R. 54-5).

Appellants' brief criticizes these repairs, pointing to testimony that a reconstruction rather than a repair program was considered and rejected (R. 194). But appellents' expert witnesses offered no criticism of the repair work; the Government experts testified that the repairs were adequate to restore the levee to its original condition (R. 227, 242); and the fact is that no further sloughs or cracks developed (R. 418). There is, therefore, firm support in the record for the finding of the court below that "the employees of the Housing Authority of Portland are not shown to have done anything legally significant" (R. 145) and that appellants "have failed to prove any negligence or wrongful conduct on the part of the Housing Authority or its employees" (R. 145).

Appellants are critical of the ring levee because they say it was designed to protect District No. 1 rather than

District No. 2. This criticism, even if it were sound, would have no legal significance since neither the United States nor the Vanport contractors had any obligation to protect appellants from flood damage. But the fact is that the criticism is not justified: first, because no one could or did foresee that flood waters would ever approach District No. 2 from the west; second, because the levee was adequately designed to protect against the only foreseeable risk, the risk that the District No. 2 levees would be overtopped; and third, because the ring levee did in fact provide protection for District No. 2. The ring levee held the flood waters for thirty hours (R. 80-1), time enough for the Oregon Governor to order and carry out the evacuation of District No. 2 (R. 81) and time enough for appellants to remove their personal property from the area (R. 391, 375).

Moreover, from the point of view of structural stability alone the ring levee, as the Government experts testified (R. 228, 243), was in every way comparable in strength with the Denver Avenue fill. When the flood waters reached Denver Avenue the first difficulty that developed was not with the ring levee but with the fill itself and only by heroic efforts was an immediate failure of the fill prevented (R. 184, 210, 217). Considered as structures, therefore, and independent of the fortunes of the flood fight, the ring levee was at least as strong as the Denver Avenue fill. Appellants have nothing to complain about.

Appellants argue that the ring levee appeared to be

better than it was and that by its very existence it lulled appellants into a false sense of security. There is nothing in the record to support this assertion. No witness testified that he was deceived. On the contrary, the features about the ring levee which appellants' experts criticized—that it was built of sand (R. 167), that it was steep (R. 167, 206), that it was circular in shape (R. 168, 206)—were, of course, perfectly apparent to even the most casual observer.

The ring levee failed under pressure of flood water coming from the west. No one could or did foresee that the ring levee would ever be called upon to withstand flood pressure from that direction. As against the only foreseeable risk, the remote possibility of water from the east, the ring levee was entirely adequate (R. 228, 243). How then can it be argued that the ring levee was carelessly constructed? Appellants are asking the Court to find negligence on account of an alleged failure to take precautions against a risk which no one, appellants included, could foresee. The failure to provide against a totally unforeseeable eventuality is not negligence—as the court below concluded and as this Court well knows.

6. The ring levee was not built or maintained by the United States or its employees.

Under the Tort Act the United States is liable only for the negligence or wrongful conduct of its employees acting in the scope of their employment (28 U.S.C.A. 1346(b))

and by express provision of the statute the United States is not liable for the negligence of the employees of "any contractor with the United States" (28 U.S.C.A. 2671). The ring levee was not built by employees of the United States. It was built by employees of the contractors who worked on the Denver Avenue underpass (R. 50) and by Fred Christensen, another Portland contractor (R. 50). This must mean, under the express language of the statute, that the United States cannot be held responsible for any negligence in the design or construction of the levee. So much for construction.

The ring levee was not repaired by employees of the United States. It was repaired by employees of the Housing Authority of Portland, a municipal organization created by resolution of the Portland City Council acting under the authority of the Oregon State Housing Authorities Law (R. 59). The District Court has concluded that the Portland Housing Authority is a Federal agency and that its employees are employees of the United States within the meaning of the Tort Act. The United States emphatically disagrees. The statutes, the cases and the facts (R. 59-76) all make it plain that local housing authorities are not part of the Federal government. The United States so argued to this Court on the appeal of the Vanport cases. In those cases the Court concluded that the no-negligence findings of the trial judge were supported by the evidence and accordingly did not reach the question of the status of the Housing Author-

ity (218 F. 2d 446, 452). In these cases it seems equally clear that the no-negligence findings are supported by the record and presumably, therefore, this Court will again find no occasion to go further. If, however, the Court should reach the question of the status of the Housing Authority, the Government respectfully requests that the Court consider the material set out in Appendix A to this brief. For the reasons there explained the Government is confident that the United States is not responsible for the negligence, if any, of Housing Authority employees.

7. The United States was not obligated to provide flood protection to appellants.

Any failure on the part of the United States to provide a ring levee adequate to protect appellants from flood damage, even if negligent, would be significant only if the United States had some obligation to provide appellants with flood protection. In Oregon, as elsewhere, negligence is actionable only if defendant has a duty to plaintiff. "Actionable negligence must be predicated upon the breach of a legal duty." *Freer v. City of Eugene*, 111 P. 2d 85, 87 (Or. 1941). "A necessary element of actionable negligence is the existence of a duty on the part of defendant to protect the plaintiff from the injury complained of." *Todd v. Pac. Ry & Nav. Co.*, 117 Pac. 300 (Or. 1911). Here no such duty exists. The United States had no obligation by statute, by common law or by contract to protect appellants from flood

waters. The fact that the ring levee was on Government property (R. 58) did not obligate the United States to maintain it with due care or at all for the benefit of appellants. This is plain enough. "The fact that a land owner avails himself of the right to repel vagrant waters of a river by embankments does not, in the absence of some further circumstances or set of circumstances, impose upon him any obligation to maintain such obstruction, or to refrain from restoring natural conditions." *The Weinberg Co. v. Bixby,* 185 Cal. 87, 101, 196 Pac. 25 (1921). See also *Vollrath v. Wabash R. Co.,* 65 F. Supp. 766, 772 (D.C.Mo. 1946); *Ireland v. Henrylyn Irr. Dist.,* 160 P. 2d 364, 365 (Colo. 1945); *Whitcher v. State,* 181 A. 549, 552 (N.H. 1935); *Branch v. City of Altus,* 159 P. 2d 1021 (Okla. 1945); *Savoie v. Town of Bourbonnais,* 90 N.E. 2d 645 (Ill. App. 1950). This rule is the inevitable consequence of the settled doctrine that flood waters are a common enemy against which each landowner is entitled to protect himself as he sees fit and without any obligation to adjoining landowners. For cases recognizing and accepting the common enemy rule see *Mogle v. Moore,* 16 C. 2d 1, 104 P. 2d 785 (1940); *Rex v. Commissioners,* 8 B. & C. 356, 108 Eng. Repr. 1075 (1828); *Cubbins v. Mississippi River Comm'n.,* 241 U.S. 351, 363 (1916); *Southern Pac. Co. v. Proebstel,* 150 P. 2d 81 (Ariz. 1944); *Kraus v. Strong,* 227 P. 2d 93 (Kans. 1951); *Sinclair Prairie Oil Co. v. Fleming,* 225 P. 2d 348 (Okla. 1949); *Bass v. Taylor,* 90 S.W. 2d 811 (Tex. 1936);

Leader v. Matthews, 95 S. W. 2d 1138 (Ark. 1936); *Smeltzer v. Borough of Ford City,* 92 A. 702 (Penn. 1914); *Honey v. Bertig Co.,* 150 S. W. 2d 214 (Ark. 1941); and in Oregon, *Street v. Ringsmyer,* 108 Or. 349, 216 Pac. 1017 (1923); *Morton v. Oregon Short Line Ry. Co.,* 48 Or. 444, 87 Pac. 151 (1906); *Price v. Oregon R. Co.,* 47 Or. 350, 83 Pac. 843 (1906).

These decisions make it clear that the common law puts the burden on each landowner to provide himself with flood protection. In so far as that burden has been shifted by statute it has been shifted not to the United States but to Peninsula Drainage District No. 2. The district was organized, as the original papers point out, for flood protection purposes:

> "5. The said district is to be organized for the construction, operation and maintenance of a drainage system and the reclamation of the said lands *and the protection thereof from overflow of the Columbia River and the Columbia Slough,* and the proposed reclamation and protection aforesaid is for both sanitary and agricultural purposes, and will be conducive to the public health and welfare and will be of public utility and benefit." (R. 331-2)

And ever since its organization District No. 2 has had ample power to obtain funds for flood protection and levee work (R. 19).

Nevertheless, during the six years which intervened be-

tween the construction of the underpass and the 1948 flood, District No. 2 and appellants did nothing: nothing to install a stop-log structure within the underpass, nothing to strengthen the ring levee, nothing by way of building a new levee. The court below concluded that under these circumstances the construction of the underpass was not the proximate cause of the damage to plaintiffs. The court found:

> "10. Peninsula Drainage District No. 2, in which plaintiffs' property was located, was organized by plaintiffs or their predecessors in interest under the drainage district laws of Oregon in 1917. District No. 2 was endowed with certain sovereign powers and was charged, as was each acre within its boundaries, with the responsibility of erecting adequate works for protecting the district lands from overflow. This duty was continuous and involved repair, maintenance and strengthening of existing walls and structures. District No. 2 at no time contributed to the construction or maintenance of Denver Avenue, and during the entire period of approximately six years between the time when the Denver Avenue underpass and ring levee were constructed and the time of the 1948 flood, District No. 2 did nothing with respect to Denver Avenue, the underpass or the ring levee. District No. 2 and not the United States had the duty of providing flood protection for lands within the district. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands. The construction of the underpass and the failure to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to plaintiffs." (R. 144).

The suggestion that appellants were unable to provide themselves with flood protection because the United States had condemned the land around the Denver Avenue underpass cannot be defended. Appellants could, no doubt, readily have obtained permission from the Highway Commission to install a stop-log structure in the underpass or from the Housing Authority to strengthen the ring levee itself if they had desired to do so. And in any event appellants were obviously in a position to build such levees as they thought appropriate on their own property or on district lands east of the ring levee. Appellants cannot condemn as impossible what was never attempted or requested.

The United States had no obligation to protect appellants from flood damage and it did nothing to prevent appellants from protecting themselves.

8. These cases relate to discretionary activity as to which there can be no liability under the Tort Act.

The decision of the Supreme Court in *Dalehite v. United States,* 346 U.S. 15, 35 (1953), settles the debate as to the meaning of the discretionary activity exemption in the Tort Act (28 U.S.C.A. 2680(a)). Mr. Justice Reed said:

> "It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifi-

cations or schedules of operations. *Where there is room for policy judgment and decision there is discretion.*" (Emphasis supplied).

To illustrate, the court cited with approval a number of decisions which involved claims for water damage. In *Coates v. United States,* 181 F. 2d 816 (C.A. 8 1950), employees of the United States were said to have been negligent in constructing and operating Mississippi flood control works. On the basis of the discretionary activity exception the complaint was dismissed and the Court of Appeals held properly so. In *Olson v. United States,* 93 F. Supp. 150 (D.C. N. D. 1950), in *Lauterbach v. United States,* 95 F. Supp. 479 (D.C. Wash. 1951), and in *North v. United States,* 94 F. Supp. 824 (D.C. Utah 1950), the claims were founded upon alleged negligence of Government employees in the operation of a Government dam and in each instance it was held that there was no jurisdiction because of the discretionary activity exemption. *Boyce v. United States,* 93 F. Supp. 866 (D.C. Ia. 1950), another decision cited with approval by Mr. Justice Reed, was a case in which the employees of the Corps of Engineers working on Mississippi navigation problems damaged plaintiff's property by blasting operations alleged to be negligent. Since the blasting was pursuant to plans and specifications approved by the Chief of Engineers it was held that there could be no recovery.

These cases would seem to control this case in all its

aspects. The decision to build or not to build the Denver Avenue underpass inevitably called for the exercise of "policy judgment"; and as far as the ring levee is concerned appellants' experts readily agreed that the determination of the proper design and construction of levees calls for an exercise of judgment (R. 169)—and therefore for an exercise of discretion.

The precise question, however, is not so broad. For the United States did not build the underpass or the ring levee. The United States did three things: it decided to arrange for the construction of Vanport, it acquiesced in the decision of the Highway Commission and the Vanport contractors to build the underpass, and it acquiesced in the subsequent decision of the contractors to build the ring levee. Surely these decisions called for the exercise of "policy judgment". They were in fact policy decisions and nothing more. If the discretionary activity exception of the statute means anything at all it means that policy decisions cannot be the subject of Tort Act claims. And all the cases so hold. See *Dalehite v. United States,* 346 U.S. 15 (1953); *Coates v. United States,* 181 F. 2d 816 (C.A. 8 1950); *Smart v. United States,* 207 F. 2d 841 (C.A. 10 1953); *Chournos v. United States,* 193 F. 2d 321 (C.A. 10 1952); *Harris v. United States,* 205 F. 2d 765 (C.A. 10 1953).

9. These claims are barred by 33 U.S.C.A. 702(c).

33 U.S.C.A. 702(c) provides:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *"

This Court in the Vanport cases (218 F. 2d 446, 452) concluded that this provision had not been repealed by the Tort Act, that it was applicable in the Columbia River Basin and that it was effective to bar the claims of the Vanport residents. The Court said:

> "The provision of 33 U.S.C.A. § 702c barring liability 'from or by floods or flood waters' expresses a policy that any federal aid to the local authorities in charge of flood control shall be conditioned upon federal non-liability. To base recovery here on any act or omission of the Engineers in assisting in the fight against this flood would run counter to the policy thus expressed. See National Mfg. Co. v. United States, 8 Cir., 1954, 210 F. 2d 263, 270-275, certiorari denied, 347 U.S. 967, 74 S. Ct. 778."

As far as federal aid is concerned, the situation at District No. 2 is identical with that at District No. 1 where Vanport was located. Both districts received extensive and almost identical assistance from the United States in rebuilding the district levees (R. 19-22, 32-5). This must mean, under the authority of the decision by this Court in the Vanport cases, that these claims are barred by section 702(c). The no liability provision of that section is unconditioned and unequivocal. It was adopted by Congress immediately after the 1927 Mississippi River flood, the flood of record on the river, a flood which resulted in tremendous

property damage. The purpose of the statute, it seems plain enough, was to make it clear that the United States, for reasons which Congress found good and sufficient, was not to be held responsible for flood loss—whatever the occasion and whenever and however it took place. (See Appendix B for the history of the statute). If the Vanport residents (*Clark v. United States,* 218 F. 2d 446 (C.A. 9 1954)) and the residents of Kansas City (*National Mfg. Co. v. United States,* 210 F. 2d 263 (C.A. 8 1954)) are precluded by section 702(c) from asserting flood damage claims against the United States, it is difficult to see why these appellants are not similarly foreclosed.

10. Since the events of which appellants complain took place prior to January 1, 1945 the court below had no jurisdiction to consider their claims.

The Tort Act confers jurisdiction on the District Court to consider "claims against the United States, for money damages, accruing on and after January 1, 1945 . . ." 28 U.S.C.A. 1346(b). The events of which appellants complain all took place and their cause of action, if any, accrued prior to January 1, 1945; accordingly the Tort Act confers no jurisdiction to hear these cases. The work on the Denver Avenue underpass was completed in February or March 1943 (R. 50). The construction of the ring levee, beginning in February, was completed in April 1943 (R. 50). During August and September 1943 the levee was raised and a clay blanket installed on its eastern slope (R. 51). The

repair work on the levee by employees of the Housing Authority of Portland was completed in the summer or fall of 1944 (R. 54) and there was no change thereafter until the failure (R. 54-5). Thus all the events now under discussion took place prior to January 1, 1945.

There has been some debate in the cases as to when the statute of limitations begins to run on a claim for water damage as a result of construction activity. The uncertainty, however, is to be found almost entirely in decisions having to do with flood damage under circumstances in which the construction itself was not claimed to be wrongful and the possibility of damage was not apparent until the flood occurred. Here the situation is quite different. Appellants are contending that the initial construction of the Denver Avenue underpass constituted a trespass and breach of contract in violation of their rights. The cause of action for that alleged wrong must have arisen no later than when the construction of the underpass was completed in the spring of 1943—and thus too early for Tort Act jurisdiction. "Where the injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is suffered or the trespass committed." *Rankin v. DeBare,* 271 Pac. 1050, 1051 (Cal. 1928). This rule recognizing that the right of action, if any, arising from the construction of a permanent structure accrues when the structure is completed has been applied in a great variety of circumstances:

in connection with the construction of highway grades (*Monarch Refrigerating Co. v. City of Chicago,* 66 N.E. 2d 692 (Ill. App. 1946); *Horner v. Winnebago County,* 74 N.E. 2d 728 (Ill. App. 1947); *Gillam v. City of Centralia,* 128 P. 2d 661 (Wash. 1942)), in connection with the construction of railroads and railroad fills (*Vanton Corporation v. New York Rapid Transit Corp.,* 13 N.E. 2d 593 (N.Y. 1938); *Norfolk & W. Ry. Co. v. Little,* 120 S.W. 2d 150 (Ky. App. 1938)); in connection with the construction of sewage plants and spraying systems (*Jeakins v. City of El Dorado,* 53 P. 2d 798 (Kans. 1936); *Kent v. City of Trenton,* 48 S.W. 2d 571 (Miss. App. 1931); *Kentucky & West Virginia Power Co. v. McIntosh,* 129 S.W. 2d 522 (Ky. App. 1939)); in connection with pipelines (*Magnolia Pipe Line Co. v. Polk,* 90 P. 2d 1076 (Okla. 1939)), a coal chute (*Missouri Pac. R. Co. v. Davis,* 53 S.W. 2d 851 (Ark. 1932)) and the removal of a balcony (*Pappas v. Braithwaite,* 162 P. 2d 212 (Mont. 1945)); and in connection with the construction of culverts, drains and dams (*Louisville & N. R. Co. v. Laswell,* 187 S.W. 2d 732 (Ky. App. 1945); *Stillwell v. City of Fort Worth,* 169 S.W. 2d 486 (Tex. App. 1943); *Tate v. Western Carolina Power Co.,* 53 S.E. 2d 88 (N.C. 1949); *Webb v. Union Electric Co. of Missouri,* 223 S.W. 2d 13 (Mo. App. 1949); *Fitzhugh v. Louisville & N. R. Co.,* 189 S.W. 2d 592 (Ky. App. 1945)).

There is no reason whatever why appellants, if they believed the construction of the Denver Avenue underpass

was an invasion of their rights, could not have moved promptly to protect those rights. In any event, since these claims depend in every aspect on 1943 activity, the Tort Act confers no jurisdiction to hear them.

11. Appellants assumed the risk of flood loss.

Each of the appellants is a property owner in District No. 2 (R. 82). The property of some of the appellants is located between Denver Avenue and Union Avenue (R. 55-6, 82); the property of others is located east of Union Avenue (R. 82). The immediate cause of damage to property east of Union Avenue was not the failure of the ring levee; it was the failure of the Union Avenue fill (R. 81). There is in the record no testimony concerning the Union Avenue failure, no basis upon which the United States could be held responsible for that failure. It is difficult to see, therefore, how property owners east of Union Avenue could have any possible claim against the Government.

Moreover, each of these appellants, like everyone else, had an obligation to protect himself from flood damage. "The law imposes upon a person sui juris the obligation to use ordinary care for his own protection, the degree of which is commensurate with the danger to be avoided." *Carroll v. Grande Ronde Electric Co.,* 84 Pac. 389, 394 (Or. 1906). *Morris v. Fitzwater,* 210 P. 2d 104 (Or. 1949). Yet for six years no one of the appellants did anything whatever to protect himself from the hazard now alleged to have

been created by the construction of the underpass. This means appellants assumed the risk.

Appellants not only did nothing to protect themselves but most if not all of them either acquired or substantially improved their properties after the underpass and the ring levee had been constructed (R. 82-3). Four District No. 2 landowners testified at the trial. One of these Mearl C. Tillman, said that he acquired his District No. 2 property in May 1945 (R. 162); obviously Mr. Tillman assumed whatever risks resulted from the 1942-3 construction of the underpass and the ring levee. Donovan C. Byers, another appellant, acquired his District No. 2 property in 1938 at a cost of $2,930 (R. 351). His total investment is now $20,000 (R. 351), a major portion of which was invested subsequent to 1942 (R. 351). John Francis Kernan, another appellant, acquired property in District No. 2 as early as 1932 (R. 384) but he too improved his property subsequent to 1942 (R. 384). Ivan F. Phipps, another appellant, testified that he had an investment in District No. 2 of more than $100,000 and that most of that investment was made subsequent to the construction of the ring levee and the Denver Avenue underpass (R. 401, 402, 403, 406).

What the situation of the other appellants may be, this record does not show. Presumably it would not be greatly different from that of the appellants whose testimony appears in the case. Surely those appellants who acquired or improved their properties subsequent to the construction of

the underpass and ring levee accepted the situation as they found it and assumed whatever risks might be incident thereto.

12. Nothing in appellants' brief justifies a decision in their favor.

The brief filed by appellants is largely an attack on the findings of the trial court, an attack based on many erroneous assumptions of fact, some of which are noted below.* The

*Appellants assert, for example, "that the United States, acting through F.P.H.A., wrongfully, unlawfully, negligently and deliberately cut an underpass through" Denver Avenue (p. 2); it is stipulated, however, that the underpass was built by the Vanport contractors under the supervision of the Highway Commission (R. 49-50). Appellants say that the liability of the United States to appellants for flood damage "was identical in every case" (p. 2); obviously, however, those appellants with property east of Union Avenue and those appellants who acquired their property subsequent to 1942 are in a special position. Appellants say that under the right-of-way deed Multnomah County was obligated to "maintain an unbroken embankment across" the right-of-way (p. 5); the fact is that the right-of-way deed says nothing whatever about "an unbroken embankment"—on the contrary, it provides for highway crossings, railroad crossings, pipes, conduits and two deep water channels through the embankment (R. 458-9). Appellants say that under the right-of-way deed Peninsula Industrial Company "retained the ownership of the embankment outside the 80 foot strip" (p. 5); but the record shows that the fill belonged in its entirety to Multnomah County and to the State of Oregon as its successor (R. 28). The fact that the fill extended beyond the right-of-way does not affect its ownership by Oregon. The deed itself provided that this might be done (R. 457) and in any event the adjoining property owner is the United States. Appellants say that the permit to construct the Denver Avenue underpass was a contract whereby F.P.H.A. agreed to pay for the upkeep of the underpass (p. 10); appellants neglect to point out, however, that by the provisions of the permit the underpass was to be maintained not by the United States but by Oregon (R. 295). Appellants argue that the permit shows that the underpass was a private road (p. 10); there is nothing in the permit to say so—on the contrary, the permit recognizes that the underpass will be used by the public, by "thousands of people" (R. 293). Appellants say that "F.P.H.A. undertook to maintain the ring dike" (p. 12); the fact is that the ring levee was maintained by the Housing Authority of Port-

most important findings have been reviewed in this brief. That review demonstrates, the Government believes, that the findings have abundant record support. Certainly the criticisms made by appellants are unjustified. Appellants complain, for example, of the finding that District No. 2 looked to the levees of District No. 1 for protection from the west (p. 37). But this finding is not only in accordance with the obvious fact; it has full record support. The stipulated pre-trial order, describing the levees of District No. 1, begins by saying: "West of the highway fill supporting Denver Avenue lies Peninsula Drainage District No. 1. The levees of that district provide protection for Peninsula Drainage District No. 2 in the sense that in the absence of a failure of one or more of those levees flood waters cannot

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land (R. 53-4). Appellants assert that the alleged "defects" in the ring dike "were hidden and concealed and not apparent to the layman's eye" (p. 14); but, according to appellants' witnesses, the defects of the ring levee were the material from which it was made, its slopes and the fact that it was circular in construction (R. 167-8). These facts, obviously, were perfectly apparent to anyone. Appellants suggest that until the District No. 1 levees were constructed Denver Avenue was the western dike for District No. 2 (p. 41); this is in error. The levees for these two districts were constructed more or less at the same time (R. 17, 30-1) and in the early days the Denver Avenue fill could not conceivably have acted as a levee because during that period it was pierced at ground level by a five foot open culvert (R. 53). Appellants say that no evidence was introduced in the case "by any one having knowledge of the railway fills as to whether a breakage there might be anticipated" (p. 54). The fact is that witnesses both for appellants and appellee testified that there was no reason to expect a failure of any of the river front levees, including the railway fills (R. 219, 224, 237, 414, 423). Appellants assert that "So far as the F.P.H.A. was concerned no notice whatever was given to District No. 2 or either district of any intention to cut any such underpass, nor any opportunity for them to object" (p. 64); but the Oregon State Highway Commission promptly notified both districts of the proposal to build the Denver Avenue underpass (R. 285, 251, 339).

approach Peninsula Drainage District No. 2 from the west" (R. 29-30). Moreover, the Dater report to the supervisors of District No. 2 specifically called attention to the same fact, namely, that the levees of District No. 1 protect District No. 2 on the west (R. 335).

Appellants complain of the finding that the Denver Avenue fill was not designed as a flood protection structure to withstand high water (p. 49). The finding is entirely correct. Denver Avenue was built not for flood protection but for highway purposes (R. 22) and absent a failure of the river front levees, which no one anticipated, no water would reach it (R. 29-30). Appellants argue that the court improperly found that no one anticipated a failure of the western embankment at District No. 1 (p. 53). But this finding is supported by all the evidence in this case (R. 219, 224, 237, 414, 423), by all the evidence in the Vanport cases (109 F. Supp. 213, 227) and by the decision of this Court on the appeal of those cases (218 F. 2d 446, 451). Appellants say that the court improperly concluded that District No. 2 made no effort to strengthen the Denver Avenue embankment (p. 56). This is precisely true. District No. 2 at no time made any effort to strengthen the Denver Avenue fill or the ring levee. Appellants say that the court improperly concluded that "this is a case of afterthought, not forethought, on the part of plaintiffs in District No. 2" (p. 62). The trial court was indisputably right. No one of the appellants ever complained to the United

States about the underpass or the ring levee until after the flood (R. 83). Appellants say that the court improperly found that no protest against the construction of the underpass was made by District No. 2 (p. 63). Here again the finding is precisely correct. The only protest, such as it was, came from District No. 1 (R. 286).

The list of instances in which the court below was correct and appellants are in error could be extended at some length. It would demonstrate, however, only what is no doubt already apparent: that the findings have full support in the record.

Conclusion

Appellants seek a large judgment on account of an alleged wrong—the construction of the Denver Avenue underpass—which, when it occurred, they accepted in complete silence. Appellants no doubt then recognized what they have since decided to ignore: that Denver Avenue is a highway and that the construction of the underpass was a legitimate highway measure necessary for the safety of the traveling public, a measure fully considered, authorized and approved by the Oregon State Highway Commission, the agency which under Oregon law had charge of Denver Avenue. This must mean that the construction of the Denver Avenue underpass was not wrongful. Certainly it was not wrongful to appellants who have no interest in, no claim

upon Denver Avenue or the fill supporting it. The case for appellants fails before it begins.

The judgment should be affirmed.

Dated June 13, 1955.

Respectfully submitted,

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APPENDIX A

THE UNITED STATES CANNOT BE HELD LIABLE FOR THE NEGLIGENCE OF EMPLOYEES OF THE HOUSING AUTHORITY OF PORTLAND.

To prove a case under the Tort Act, a plaintiff must demonstrate a negligent or wrongful act or omission "of any employee of the Government while acting within the scope of his office or employment * * *" 28 U.S.C.A. 1346(b). Within the meaning of this section " 'Employee of the government' includes officers or employees of any federal agency * * *" 28 U.S.C.A. 2671. " 'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States." 28 U.S.C.A. 2671. The Court below concluded that the Housing Authority was, in effect, project manager for the United States at Vanport, and therefore a federal agency. The United States disagrees.

The Housing Authority, created by the Portland City Council acting under the Oregon State Housing Authorities Law (R. 59), is a quasi-municipal corporation and an agency of Oregon. See *Wickman v. Housing Authority of Portland,* 247 P.2d 630 (Or. 1952).* Since it was first

*For other decisions to the same effect see *Brammer v. Housing Authority of Birmingham District,* 195 So. 256 (Ala. 1940); *Denard v. Housing Authority of Ft. Smith,* 159 S.W. 2d 764 (Ark. 1942); *Kleiber*

created, HAP has owned and operated a 400-dwelling unit, low-rent project located in Portland known as Columbia Villa (R. 61). It has also leased from the United States some fifteen war housing projects (R. 63-64) including Vanport and East Vanport. HAP's interest in these projects depends entirely upon a formal agreement of lease (Ex. 40) by the terms of which the financial risk of the operation is on the United States (Ex. 40). This financial arrangement does not mean that agreement is any less a lease. Compare *Ault Wooden-Ware Co. v. Baker,* 58 N.E. 265 (Ind. App. 1900); *Van Avery v. Platte Valley Land & Inv. Co.,* 275 N.W. 288 (Neb. 1937); *In re Owl Drug Co.,* 12 F. Supp. 439 (D.C. Nev. 1935); 170 A.L.R. 1113. In Oregon, "there are three essential elements of a lease, namely, description of the property, duration of term, and rental consideration." *Young v. Neill,* 220 P.2d 89, 91 (Or. 1950); *Bevan v. Templeman,* 26 P.2d 775, 778 (Or. 1933). The HAP lease meets and more than meets these requirements.

The argument that HAP is a federal agency and not, as it appears to be, an agency of Oregon leasing property from the United States, depends to a large extent on certain

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v. Newton, 101 P. 2d 21 (Colo. 1940); *Edwards v. Housing Authority of City of Muncie,* 19 N.E. 2d 741 (Ind. 1939); *Spahn v. Stewart,* 103 S.W. 2d 651 (Ky. 1937); *State ex rel. Portrie v. Housing Authority of New Orleans,* 182 So. 725 (La. 1938); *Laret Inv. Co. v. Dickmann,* 134 S.W. 2d 65 (Mo. 1939); *State ex rel. Great Falls Housing Authority v. City of Great Falls,* 100 P. 2d 915 (Mont. 1940); *Lennox v. Housing Authority of City of Omaha,* 290 N.W. 451 (Neb. 1940); *and Wells v. Housing Authority of City of Wilmington,* 197 S.E. 693 (N.C. 1938).

releases issuing from the Federal Public Housing Authority in Washington and addressed to such local housing authorities as HAP. These releases are part of a so-called Manual of Policy and Procedure created by FPHA early in 1942 (R. 69). The Manual is designed (a) to express FPHA policy and requirements on subjects which, under the lease agreements, are for FPHA decision or approval; (b) to express the views of FPHA on subjects which are for decision by the local housing authorities but which involve the fundamental policy of the housing program; and (c) to provide information which may be of use to the local authorities (R. 70). The Manual is prepared in loose-leaf fashion (R. 70). From time to time FPHA distributes new mimeographed releases to be inserted in the Manual (R. 70). These releases are general in terms in the sense that they are not directed to any particular person or any particular housing authority (R. 70). The subjects covered by the releases are as follows: (a) budget and expense, including accounting; (b) care of and accountability for government property, including property in a terminated or stand-by status and including the disposition of such property; (c) selection of tenants and rental arrangements; (d) rental rates; (e) community services; (f) commercial operations on the projects; and (g) reports (R. 71). The Manual relates to all housing operations in which FPHA has an interest, including both low rent and war housing (R. 71). As of any given date, therefore, all the releases in the Manual

are not applicable to any particular project (R. 71). On May 30, 1948, there were approximately 125 releases in the Manual relating to projects such as Vanport and East Vanport (R. 71).

These releases do not demonstrate that the United States controlled the HAP operation. On the contrary, the releases, in every instance, are responsive to and consistent with the lessor-lessee arrangement. During the war FPHA, with scores of such leases throughout the country, naturally wished to standardize accounting, reports and procedures. This, and only this, the releases accomplished. They did not interfere with local management and they did not modify the basic lessor-lessee arrangement.* Moreover it is

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*A number of the releases are in the record. Some of them (Exs. 65(m), 65(x)) are dated after May 30, 1948; others (Exs. 65,a), 65(e), 65(p), 65(q)) were rescinded or replaced prior to May 30; and others (Exs. 65(f), 65(g)) relate only to construction operations. One of the releases (Ex. 65(b)), has to do with the Hatch Act which by its terms applies to state employees working on projects financed in part by the United States. One (Ex. 65(c)) relates to in-grade promotion of FPHA employees and, as the numbering system indicates, has no applicability. One (Ex. 65(d)) relates to personnel policies but, as the exhibit itself makes clear, all the significant decisions, such as salary rates, vacation periods, etc., are left for local authority determination. One (Ex. 65(j)) relates to the lease requirement that the local authorities carry public liability insurance. One (Ex. 65(l)) relates to the prevailing wage requirements of the United States Housing Act of 1937. One (Ex. 65(n)) encourages local authorities to provide community services to their tenants without undertaking to specify what those services should be.

Since the United States had the ultimate financial risk with respect to the operation of the properties, a number of the releases have to do with financial matters: Accounting problems (Ex. 65(o)) uncollectible accounts (Ex. 65(v)), damage claims (Ex. 65(k)), budgets (Exs. 65(aa), 65(bb)) and rents (Exs. 65(ff), 65(gg)). The property at Vanport belonged to the United States and HAP as lessee was responsible for it. Accordingly, releases were issued having to do with inspection systems and fire hazard

Congress and not the author of an FPHA release who decides what is and what is not a federal agency. And Congress has made it plain that local housing authorities such as HAP are not part of the Federal Government.

In 1937 Congress declared its purpose with respect to low-rent housing to be "to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions * * * that are injurious to the health, safety, and morals of the citizens of the Nation." (42 U.S.C.A. 1401). To this end Congress provided for loans (42 U.S.C.A. 1409), annual contributions (42 U.S.C.A. 1410) and capital grants (42 U.S.C.A. 1411) "to public housing agencies", that is, to

> "(11) The term 'public housing agency' means any State, county, municipality, or other governmental entity or public body (excluding the Administration), which is authorized to engage in the development or administration of low-rent housing or slum clearance. The Administration shall enter into contracts for

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(Exs. 65(r), 65(s), 65(t) records and inventories (Exs. 65(ii), 65(mm), 65(m)), surveys in event of fire (Ex. 65(oo)), thefts and bonding of employees (Exs. 65(gg), 65(rr)), maintenance problems (Exs. 65(n), 65(ss), 65(tt)) and the disposition of surplus properties (Exs. 65(hh), 65(ii), 65(jj), 65(kk)).

Since it was agreed that during the war the tenants should be persons employed in war industries releases were issued relating to tenant eligibility (Exs. 65(y), 65(dd)). Of the remaining exhibits one (Ex. 65(w)) relates to moving expenses of tenants in projects on a terminated status, one (Ex. 65(z)) relates to projects other than war housing projects, one (Ex. 65(cc)) relates to the use of the premises for public health purposes and one (Ex. 65(pp)) is an index.

> financial assistance with a State or State agency where such State or State agency makes application for such assistance for an eligible project which, under the applicable laws of the State, is to be developed and administered by such State or State agency." (42 U.S.C.A. Supp. 1402(11)).

This, obviously, is not a reference to an agency of the Federal Government. It is a reference to an independent organization with whom the United States is authorized to make all manner of contracts (42 U.S.C.A. 1409-15), to whom it may make loans (42 U.S.C.A. 1409) and arrange sales (42 U.S.C.A. 1412) and whose obligations (42 U.S.C.A. Supp. 1421(a)) are to be sharply distinguished from the obligations of the Government (42 U.S.C.A. 1420).

The war brought in its wake a host of housing problems. Congress provided for consultation by Federal representatives with "local public officials and local housing authorities" (42 U.S.C.A. 1545) on questions relating to war housing and authorized FPHA "to rent, lease, exchange, sell for cash or credit, and convey the whole or any part" of a war housing project (42 U.S.C.A. 1544) as it saw fit. Under the circumstances nothing was more natural than for FPHA to lease part of its war housing to local agencies such as HAP. This did not mean that the local authorities were *ipso facto* transformed into federal agencies.

Peace brought an end to the war aspect of the housing program but Congress recognized that in the hands of the

local authorities war housing might serve a useful post-war purpose. To this end Congress provided for a conveyance of the Government's interest in certain named war housing projects to "the following local public housing agencies." (42 U.S.C.A. Supp. 1586). In the list is Portland Project No. 35021, known as Dekum Court (Ex. 40), and the authorized conveyance is to "Housing Authority of Portland." (42 U.S.C.A. Supp. 1586). This is, of course, express recognition by Congress that HAP is a "local public housing agency" and not part of the Federal Government.

The legislative history of the Federal housing legislation is all to the same effect. In introducing Senate Bill 1685, which eventually became the Housing Act of 1937, Senator Wagner said (38 Cong. Rec. 1889):

> "All the direction, planning and management in connection with publicly assisted housing projects are to be vested in local authorities, springing from the initiative of the people in the communities concerned. The Federal Government will merely extend its financial aid through the medium of these agencies."

The House Committee on Banking and Currency in its report on S. 1685 said (H. Rep. 1545, 75th Cong., 1st Sess.):

> "General Statement
>
> The bill provides assistance to the States and their political subdivisions in the remedying of unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families

whose income is so low that they cannot afford adequate privately owned dwellings. * * *

Decentralization

In contrast to present housing activities of the Federal Government, the bill contemplates a complete decentralization of the housing program, including the sale or leasing to public agencies of presently owned Federal housing projects. The bill does not authorize the direct Federal construction of any additional housing projects, but provides for a non-Federal program consisting of financial assistance to the states and their political subdivisions in the development and operation of local slum-clearance and low-rent housing projects."

In 1949 Congress carefully reviewed the housing program in connection with the Housing Act of that year. The Senate Committee on Banking and Currency again emphasized that local authorities such as HAP were strictly local organizations and said (S. Rep. 284, 81st Cong., 1st Sess.):

"The public-housing program is administered in the localities by local housing authorities which develop, own, and operate the low-rent projects. These local authorities were created pursuant to State law, and their members are usually appointed by the mayors of the respective localities. Although these local housing authorities have in almost every case enjoyed close and satisfactory relationships with the governing bodies of their localities, your committee has nonetheless believed it advisable to insert in the pending bill provi-

sions which will assure that the operations of the local authorities have the general approval and support of their respective local governments.

"The prime responsibility for the provision of low-rent housing is thus in the hands of the various localities. The role of the Federal Government is restricted to the provision of financial assistance to the local authorities, the furnishing of technical aid and advice, and assuring compliance with statutory requirements." (p. 16).

The House Committee on Banking and Currency expressed similar views. (See H.R. No. 590, 81st Cong., 1st Sess., p. 18).

This material, in the Government's judgment, leaves no room for argument. Congress has been very careful to make it clear that local agencies such as HAP must be recognized for what they are, that is, agencies of the several states and not agencies of the Federal Government. This is tantamount to saying that local housing authorities are not federal agencies within the meaning of the Tort Act. The Congressional determination on that point is clear and it is conclusive.

There is in fact no contrary suggestion in the books. Most of the states have housing laws roughly comparable to the Oregon legislation under which HAP was organized. In considering the constitutionality of such legislation careful attention has been given to the position and purpose of the local authorities. Nowhere has there been a suggestion

that the authorities are part of the Federal Government. See *The Housing Authority v. Dockweiler,* 94 P. 2d 794 (Cal. 1939); *New York City Housing Authority v. Muller,* 1 N.E. 2d 153 ,N.Y. 1936); *Opinion of the Justices,* 48 So. 2d 757 (Ala. 1950); *Nashville Housing Authority v. City of Nashville,* 237 S.W. 2d 946 (Tenn. 1951); *Opinion to the Governor,* 63 A. 2d 724 (R.I. 1949); *Dornan v. Philadelphia Housing Authority,* 200 A. 834 (Pa. 1938); *Belovsky v. Redevelopment Authority,* 54 A. 2d 277 (Pa. 1947); *Ryan v. Housing Authority of City of Newark,* 15 A. 2d 647 (N.J. 1940); *City of Phoenix v. Superior Court,* 175 P. 2d 811 (Ariz. 1946); 175 A.L.R. 1069. The courts have also been called upon to decide whether the local authorities are subject to suit. Again there has been no suggestion that they are federal agencies. See *Wickman v. Housing Authority of Portland,* 247 P. 2d 630 (Or. 1952); *Ryan v. Boston Housing Authority,* 77 N.E. 2d 399 (Mass. 1948); *Housing Authority of Birmingham District v. Morris,* 14 So. 2d 527 (Ala. 1943); *Muses v. Housing Authority,* 189 P. 2d 305 (Cal. App. 1948).

There is nothing in the record or in the precedents to support an argument that HAP is a federal agency. What single characteristic does it have in common with an ordinary federal agency? It was created not by Congress but by the mayor of Portland; it exists not because of a federal statute but because of an act of the Oregon legislature; it is operated not by officers of the United States appointed

by the President but by commissioners serving at the request of the Portland mayor; it borrows money from and enters into elaborate contracts with the United States, a procedure hardly sensible if HAP were part of the Federal Government. HAP is not a federal agency. The relation of HAP to the United States is strictly that of a lessee to its lessor, a contractual arrangement. The Tort Act provides expressly that "any contractor with the United States" is not to be considered a "federal agency". 28 U.S.C.A. 2671.

Just as HAP is demonstrably a local rather than a federal agency, so the employees of HAP are demonstrably employees of that organization alone and not employees of the United States. As of May 30, 1948, HAP had approximately 675 employees (R. 74) all reporting directly or indirectly to the executive director who, in turn, reports to the commissioners appointed by the Portland mayor (R. 73). Terms and conditions of employment for HAP personnel are fixed not by Congress but by HAP (R. 74). This includes salaries, vacation periods, working hours, rates of pay, etc. (R. 74). The application form provided to prospective HAP employees makes no mention of the United States (R. 74, Ex. 55). HAP employees receive their pay not from the Treasury but from funds obtained by HAP from rental payments (R. 74). This was the source of their pay in May, 1948 (R. 74). The HAP checks to its employees are not Treasury checks and they do not refer to the United States (R. 74; Ex. 56). HAP employees take no oath of loyalty

to the United States; they have no civil service status; they do not participate in the Federal Employees Retirement Plan; their rates of pay are not affected by general pay increases authorized by Congress for federal employees (R. 74). On the contrary they receive the benefits of the Oregon workmen's compensation scheme and approximately two-thirds of them, those engaged in maintenance work, are trade union members (R. 74-75). HAP under its union contracts obtains the help it requires by making demands upon the union (R. 75; Exs. 59-63), a method of employment hardly compatible with the civil service system. All employees of HAP receive their instructions from representatives of that organization and not from representatives of the United States (R. 72).

There is nothing here to support an argument that HAP employees are Government employees and the decisions in comparable situations are all to the contrary. In *Powell v. U. S. Cartridge Co.,* 339 U.S. 497, 507 (1950) munitions were made for the Government, under close Government supervision, from Government materials in a plant built and owned by the Government. The plant was operated by the Cartridge Co. on a cost-plus-a-fixed-fee basis with the result that the plant employees were paid with Government money. Nevertheless, the Court held that those employees were not federal employees:

> "In these great projects built for and owned by the Government, it was almost inevitable that the new

equipment and materials would be supplied largely by the Government and that the products would be owned and used by the Government. It was essential that the Government supervise closely the expenditures made and the specifications and standards established by it. These incidents of the program did not, however, prevent the placing of managerial responsibility upon independent contractors.

"The relationship of employee and employer between the worker and the contractor appears not only in the express terminology that has been quoted. It appears in the substantial obligation of the respondent-contractors to train their working forces, make job assignments, fix salaries, meet payrolls, comply with state workmen's compensation laws and Social Security requirements and 'to do all things necessary or convenient in and about the operating and closing down of the Plant, * * *'

* * * * *

"The petitioner-employees and the Government expressly disavow, in their briefs, any employment relationship between them. The managerial duties imposed upon the respondents were the duties of employers. That such duties be performed by private contractors was a vital part of the Government's general production policy. In the light of these considerations, we conclude that the respective respondents, in form and in substance, were the employers of these petitioners within the meaning of the Fair Labor Standards Act."

If employees in a Government plant, paid with Government funds and producing Government munitions under close

Government supervision are not United States employees, how can it be argued that the HAP employees working for an organization organized under state law, paid with private moneys, hired and fired by HAP officials, and subject to their daily activities to no Government supervision are federal employees?

Powell was a decision under the Fair Labor Standards Act. Comparable decisions have been reached under the Tort Act. In *Fries v. United States,* 170 F. 2d 726 (C.A. 6 1948) the United States Public Health Service provided funds and equipment to a county board of health to conduct, in cooperation with the Health Service, a venereal disease survey in an area where troops were quartered. The Government money was to be used, among other things, to hire chauffeurs, one of whom negligently injured the plaintiff. It was held that the United States was not responsible for the reason that the chauffeur was not a "federal employee". In *Lavitt v. United States,* 177 F. 2d 627, 629 (C.A. 2 1949) plaintiffs owned a warehouse and certain potatoes stored in it. They applied to the United States for a loan under the farm price support program. Under the statute local farmer committees selected inspectors to review loan applications. When plaintiffs' application was received, the local committee appointed inspectors who, in the course of their work, negligently set fire to the warehouse. It was held that the United States was not respon-

sible. The court ruled that the local committee was not a federal agency

> "We think it clear that the Tolland County Agricultural Association is not a federal agency in any way resembling an executive department or independent establishment of the United States and it certainly is not a corporation. Its employees or officers were not and could not be selected by the United States or the Department of Agriculture, or discharged by either." (pp. 629-30)

and that the inspectors were not "persons acting on behalf of a Federal agency":

> "The plaintiffs, however, assert liability on the ground that the inspectors were 'persons acting on behalf of a Federal agency in an official capacity,' and, therefore, governmental employees as defined in 28 U.S.C.A. § 941(b), above quoted. Perhaps they were to some extent acting on behalf of a federal agency as well as the borrowers, but to impose a liability based upon a putative agency over which the principal had no more control than in the present case would stretch governmental responsibility too far and might include all sorts of situations in which the United States required a conditional certification or approval before making a loan. It seems clear to us that the Government had no relation with inspectors chosen by the County Agricultural Association that would impose a liability to suit because of negligent acts on their part. A waiver of governmental immunity must be clear and in our opinion has not been shown in the present case." (p. 630)

There is nothing in the record before the Court, there is nothing in the books to support a conclusion that HAP is a federal agency or that its employees are federal employees.

Liability under the Tort Act depends upon the rule of *respondeat superior. United States v. Campbell,* 172 F. 2d 500, 503 (C.C.A. 5 1949); *United States v. Eleazer,* 177 F. 2d 914, 918 (C.C.A. 4 1949); *United States v. Sharpe,* 189 F. 2d 239 (C.C.A. 4 1951). Under that rule the principal is held responsible for the torts of a servant because he selects the servant and controls his activity. The United States did not select the employees of HAP and did not participate in any way in their day to day activities. Certainly the United States did not direct or control what the HAP employees did or did not do in connection with the flood fight. HAP is not a federal agency; its employees are not Government employees. This means that no claim can be presented against the United States on account of the alleged negligence of employees of the Housing Authority.

APPENDIX B

CONGRESS HAS PROVIDED THAT THE UNITED STATES SHALL NOT BE LIABLE FOR FLOOD DAMAGE.

Claims against the United States on account of flood damage are not novel. Floods are one of the most persistent of the nation's problems. The loss is frequently tremendous. The 1948 Columbia River flood caused damage estimated at one hundred million dollars. The property loss in the recent Kansas City flood was approximately two and one-half billion dollars. "The average annual losses from flood damage in the United States have been estimated from 100 to 500 million dollars * * *" (H. Rep. No. 1092, 82d Cong. 1st Sess., p. 6). Congress has always been unwilling to become responsible for flood damage. In response to a suggestion that the Government undertake an indemnity program for the victims of the Kansas City flood, the House Committee said:

> "The budget request includes a proposal to indemnify flood victims for physical loss of or damage to tangible real or personal property up to 80 percent of the amount of such loss, provided that the amount to be paid any one person submitting such a claim does not exceed $20,000. The Committee heard considerable testimony on this recommendation, and after careful deliberation has not approved it for several important reasons.
>
> "Congress has never appropriated funds for indemnities such as have been proposed here in any

previous disaster of this kind, and no legislation has ever been enacted by Congress authorizing such appropriations. This would be a major departure from the present concept of Government and, therefore, must be given more extensive study than is now possible under emergency conditions that demand prompt action on the part of the Congress. The Committee believes that the approval of the proposed indemnification program would commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster throughout the country regardless of the type or size of the disaster. The financial implications inherent in such an action would be enormous." (H. Rep. No. 1092, 82d Cong. 1st Sess., p. 5.)

The courts have been as unwilling as Congress to "commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster." For many years and in a wide variety of circumstances, claims have been filed under the Fifth Amendment seeking compensation for damage caused by the Government's flood control operations. They have always been denied. *Bedford v. United States,* 192 U.S. 217, 224 (1904); *Jackson v. United States,* 230 U.S. 1, 23 (1913); *Cubbins v. Mississippi River Commission,* 241 U.S. 351 (1916); *Sanguinetti v. United States,* 264 U.S. 146 (1924); *United States v. Sponenbarger,* 308 U.S. 256 (1939); *Oklahoma v. Atkinson Co.,* 313 U.S. 508 (1941); *Gulf Refining Co. v.*

Mark C. Walker & Son Co., 124 F. 2d 420 (C.C.A. 6 1943); *United States v. West Virginia Power Co.,* 122 F. 2d 733 (C.C.A. 4 1941); *Goodman v. United States,* 113 F. 2d 914 (C.C.A. 8 1940); *Lynn v. United States,* 110 F. 2d 586 (C.C.A. 5 1940); *Franklin v. United States,* 101 F. 2d 459 (C.C.A. 6 1939). This is true even though the Federal officers, as an emergency measure, have dynamited levees, thereby inundating plaintiffs' property. *Hughes v. United States,* 230 U.S. 24 (1913); *Danforth v. United States,* 308 U.S. 271, 287 (1939).

This result does not depend upon doctrines of sovereign immunity or limitations in the Fifth Amendment. The Tennessee Valley Authority is subject to suit. Nevertheless, flood damage claims against it, even though asserted in terms of negligence or wrongful conduct, cannot be maintained. See *Grant v. T.V.A.,* 49 F. Supp. 564, 566 (1942). *Atchley v. T.V.A.,* 69 F. Supp. 952, 954 (1947). The decisive considerations are those of public policy. As Mr. Justice McKenna said in *Bedford v. United States,* 192 U.S. 217, 223 (1904):

> "The consequences of the contention immediately challenge its soundness. What is its limit? * * * And if the government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. * * * Conceding the power of the government over navigable rivers, it would make that power impossible of exercise,

> or would prevent its exercise by the dread of an immeasurable responsibility."

To the extent that flood damage claims are founded upon the Fifth Amendment, they are, of course, beyond Congressional control. In the area, however, in which Congress is free to act, including the area of these cases, Congress has unequivocally forbidden recognition of such claims. 33 U.S.C.A. 702(c) provides:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *"

In denying recognition to any claim against the United States on account of flood damage Congress was unequivocal and emphatic. And Congress meant exactly what it said.

Federal flood control legislation in this country goes back to 1851. In the general appropriation act for that year Congress provided $50,000 "For the topographical and hydrographical survey of the Delta of the Mississippi * * *" (9 Stat. 523, 539). In 1879 the Mississippi River Commission was created and obligated to prepare for Congress "such plan or plans and estimates as will correct, permanently locate, and deepen the channel and protect the banks of the Mississippi River; improve and give safety and ease to the navigation thereof; prevent destructive floods; promote and facilitate commerce, trade, and the postal service; * * *" (21 Stat. 37, 38). In 1893 Congress created the California Debris Commission and instructed

it to look into problems of navigability and flood control on California rivers (27 Stat. 507). In 1917 by an Act "To provide for the control of the floods of the Mississippi River and of the Sacramento River, California," Congress appropriated forty-five million dollars to be expended for flood control purposes (at the rate of ten million dollars a year) under the direction of the Secretary of War and in accordance with plans of the Mississippi River Commission and the California Debris Commission (39 Stat. 948). And thus the matter stood until 1927.

In 1927 the Mississippi Valley was devastated by its flood of record. Congress immediately gave consideration to flood control measures, culminating in the Flood Control Act of 1928 (45 Stat. 534) entitled "An Act for the Control of floods on the Mississippi River and its tributaries, and for other purposes." Section 1 establishes a board of engineers to study Mississippi problems. Section 2 approves the principle of local contribution to the cost of flood control with specific exceptions. Section 3, paragraph one, obligates local interests to provide easements and rights of way and to assume responsibility for the maintenance and operation of the levee structures to be built under the Act. The second paragraph of Section 3 contains the language which now appears as Section 702c of Title 33. That paragraph reads as follows:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by

floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

The statute goes on to provide for acquisition of flowage rights by the United States, for participation of various Government agencies in work to be done under the Act, for distribution of funds in connection with the Mississippi program, for further reports and studies and, finally, for a limitation on the contribution of the United States to flood control measures proposed by the California Debris Commission for California rivers.

The no-liability language of Section 3 came into the Act as a result of a conference between the House and Senate managers and without explanation (See H. Rep. No. 1505, 70th Cong., 1st Sess.). But it is not difficult to identify the source of this provision. President Coolidge in his 1927 State-of-the-Union message (Cong. Rec. Sen.,

Dec. 7, 1927, p. 106) reviewed the problems created by the 1927 flood, proposed additional flood control legislation, and added words of caution about the position of the Government. He said:

> "It is necessary to look upon this emergency as a national disaster. It has been so treated from its inception. Our whole people have provided with great generosity for its relief. Most of the departments of the Federal Government have been engaged in the same effort. The governments of the afflicted areas, both State and municipal, can not be given too high praise for the courageous and helpful way in which they have come to the rescue of the people. If the sources directly chargeable can not meet the demand, the National Government should not fail to provide generous relief. This, however, does not mean restoration. The Government is not an insurer of its citizens against the hazard of the elements. We shall always have flood and drought, heat and cold, earthquake and wind, lightning and tidal wave, which are all too constant in their afflictions. The Government does not undertake to reimburse its citizens for loss and damage incurred under such circumstances. It is chargeable, however, with the rebuilding of public works and the humanitarian duty of relieving its citizens from distress."

This is clear enough: the Federal Government will extend its flood control program and provide relief where relief is needed; but it will not pay for flood damage. Section 3 was intended to put this point beyond argument. And it does so. There is no conflicting view.